Supreme Court, U.S.
F I L E D
MAR 8 1993
OFFICE OF THE CLERK

No. 92-1306

In The

Supreme Court of the United States

October Term, 1992

TONY ALAMO,

Petitioner,

v.

ROBERT A. MILLER; KODY MILLER by ROBERT A. MILLER; ROBERT A. MILLER by ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER by CAREY MILLER; RICK MILLER; and JAMES MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER N. GEORGIADES
1300 Gulf Tower
Seventh Avenue and Grant Street
Pittsburgh, Pennsylvania 15219
(412) 391-3434

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court abused its discretion in refusing to hold an evidentiary hearing on a motion under F.R.Civ.P. 60(b), where the issues the movant sought to litigate under the motion had been previously raised and litigated to judgment by his co-defendants in the same case, where the co-defendants were corporations which the District Court had previously held to be sham entities operating as mere "alter egos" of the movant, and where the District Court's judgment setting aside the corporate forms had been appealed and affirmed prior to the filing of motion under Rule 60(b).

II. Whether the District Court abused its discretion in refusing to hold an evidentiary hearing on a motion under F.R.Civ.P. 60(b), where the issues the movant sought to litigate under the motion had been previously raised and litigated to judgment by the movant's co-defendants in the same case, where the co-defendants were corporations which had been twice previously adjudicated in state courts to be sham entities operating as mere "alter egos" of the movant, in cases in which the movant and the corporations were all before those courts, and where the two prior state court judgments had never been appealed and had become final prior to the filing of the motion under Rule 60(b).

III. Whether, on a motion under F.R.Civ.P. 64(b), the District Court abused its discretion by refusing to hold a hearing on the issue whether the plaintiffs' efforts to

QUESTIONS PRESENTED FOR REVIEW – Continued

effect personal service upon the defendant before resorting to service by publication were sufficient to satisfy due process, where the record before the District Court overwhelmingly established: (1) the plaintiffs made several attempts to locate and serve the defendant before resorting to service by publication; (2) the defendant was a fugitive from justice at the time of service by publication and elected to remain a fugitive and suffer a default judgment rather than risk apprehension; (3) the defendant was aware of the pendency of the litigation before and after judgment was entered against him; and (4) the defendant was also aware that the plaintiffs and hundreds of others not party to the case were relying upon the finality of the judgment, but failed and refused to take any action to assert his claims of defective service until after he was apprehended by authorities, eighteen months after judgment against him was entered.

IV. Whether a party who litigates and loses on a claim that he is entitled to possession of records previously abandoned in premises seized and sold in execution upon a judgment is barred under the doctrine of *res judicata* from reasserting the same claim three months later, where he failed to appeal the initial adverse ruling, and in the interim between the first ruling and the second attempt to litigate the question the first ruling had become final and non-appealable.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT AGAINST GRANTING THE WRIT 17

ARGUMENT AGAINST ISSUANCE OF THE WRIT 18

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE ISSUE OF THE CORPORATE LITIGANTS' IDENTITY AS SURROGATES FOR TONY ALAMO WAS *RES JUDICIATA*, AND NO FURTHER REVIEW OF THAT QUESTION WAS NECESSARY OR PERMISSIBLE 18

A. When the petitioner appeared before the District Court and moved for relief from judgment under F.R.Civ.P. 60(b), the question of his identity with the corporate litigants was *res judiciata* 18

B. The fact that the status of the corporations as "alter egos" of Mr. Alamo was settled in prior litigation is a primary distinguishing factor between this case and *Zenith Radio Corporation v. Hazeltine Research, Inc.* 23

TABLE OF CONTENTS – Continued

Page

II. SIMILARLY, THE PETITIONER WAS PROPERLY BARRED UNDER THE DOCTRINE OF *RES JUDICATA* FROM ATTEMPTING TO RELITIGATE HIS CLAIM THAT DOCUMENTS ABANDONED BY THE CORPORATIONS IN PREMISES SEIZED IN EXECUTION SHOULD BE TURNED OVER TO HIM, A YEAR AFTER THE PROPERTIES WERE DISPOSED OF 26

CONCLUSION 29

APPENDIX

Opinion in *Miller v. Tony Alamo*, No. 91-1447WA & No. 92-2205WA (8th Cir., November 19, 1992) 1a

Order in *Miller v. Tony and Susan Alamo Foundation*, Civil No. 88-2206 (W.D. Ark., February 12, 1992 ..... 3a

Order in *Miller v. Tony and Susan Alamo Foundation* Civil No. 88-2206 (W.D. Ark., April 27, 1992) 9a

Miller v. Tony and Susan Alamo Foundation, 924 F.2d 143 (8th Cir. 1991) 11a

Pertinent Texts of Constitutional Provisions and Rules of Court Involved 23a

Order and Judgment in *Miller, et al. v. Tony and Susan Alamo Foundation, et al*, C.A. No. 88-2206 (Arnold J.) (W.D. Ark., April 19, 1990) 27a

Order and Judgment in Judgment in *Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, C.A. No. 88-2206 (Arnold J.) (W.D. Ark., April 27, 1990) ... 30a

Opinion in *Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, No. 90-1826 (8th Cir., January 23, 1991) 33a

Memorandum Opinion in *Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, C.A. No. 88-2206 (Arnold J.) (W.D. Ark., April 27, 1990) 45a

TABLE OF CONTENTS – Continued

Page

Order and Judgment in *Robert A. Miller, et al. v. Tony and Susan Alamo, et al.*, Civil Action No. CV90-15200 (Superior Court of the State of Arizona, in and for County of Maricopa) 56a

Order and Judgment in *Robert A. Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, No. E-90-284(I) (Chancery Court of Crawford County, Arkansas) 64a

TABLE OF AUTHORITIES

Page

CASES

Bally Export Corp. v. Balicar Ltd., 804 F.2d 398 (7th Cir. 1981) 26

Brown v. Kenron Aluminum and Glass Corporation, 477 F.2d 526, 531 (8th Cir. 1973) 21

Certified Building Products v. National Labor Relations Board, 528 F.2d 968 (9th Cir. 1976) 25

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 27

Deposit Bank v. Frankfort, 191 U.S. 499, 24 S.Ct. 154 (1903) 21

Elizabeth Hanford Dole v. Tony and Susan Alamo Foundation, et al., Civil Action No. 77-2183 (W.D. Ark.) 10

Hoffman v. Celebrezze, 405 F.2d 833, 836 (8th Cir. 1969) 28

Hugel v. McNell, 886 F.2d 1 (1st Cir. 1989) 22

I.A.M. National Pension Fund v. Wakefield Industries, 699 F.2d 1254, 1259 (D.C. Cir. 1983) 26

Kapp v. Naturelle, Inc., 611 F.2d 703, 707-708 (8th Cir. 1979) 21

Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Management, Inc., 519 F.2d 634, 637-638 (8th Cir. 1975) 25

Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990) 20

TABLE OF AUTHORITIES – Continued

Page

Minnesota Mining and Mfg. Co. v. ECO Chem., Inc., 757 F.2d 1256, 1265 (Fed. Cir. 1985) 26

Molinaro v. New Jersey, 396 U.S. 365, 90 S.Ct. 498 (1970) 13

Morris v. Jones, 329 U.S. 545, 500-551 (1946) 21

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 22

Nevada v. United States, 463 U.S. 110, 129, 103 S.Ct. 2906, 2918 (1983) 20, 27

N.L.R.B. v. Denna Artware, Inc., 310 F.2d 470 (6th Cir. 1962) 26

Poe v. John Deere Co., 695 F.2d 1103 (8th Cir. 1982) 20, 27, 28

Reed v. Allen, 286 U.S. 191, 52 S.Ct. 532 (1932) 21

Riehle v. Margolies, 279 U.S. 218, 225 (1929) 21

United States v. Euge, 691 F.2d 379 (8th Cir. 1982) 20

United States v. Tony Alamo, CR-90-20008-1 (W.D. Ark. 1991) 8, 9

United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986) 28

Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 17, 23, 24, 25, 26

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND COURT RULES

Federal Rules of Civil Procedure

F.R.Civ.P. Rule 60(b) ..... *passim*

F.R.Civ.P. Rule 4(c)(2)(C)(i) 5

F.R.Civ.P. Rule 4(c)(2)(C)(ii) 2

F.R.Civ.P. Rule 4(e) 5

F.R.Civ.P. Rule 4(j) 9

Federal Rules of Appellate Procedure

F.R.A.P. Rule 4(a)(1) 28

Arkansas Rules of Civil Procedure

Ark.R.Civ.P. Rule 4(f) 5, 14

Ark.R.Civ.P. Rule 17 13

Secondary Authorities

Restatement of Judgments (2nd) § 16 (1982) 23

Restatement of Judgments (1st) § 44 23

STATEMENT OF THE CASE

The appeal with respect to which the Petitioner now seeks a writ of certiorari arose as a consequence of the District Court denying a motion for relief from judgment made pursuant to F.R.Civ.P. 60(b). In his Petition the Petitioner has badly distorted the record, citing material out of context failing to note important facts which belie his contentions. To place the Petitioner's Rule 60(b) motion in the proper context, the Respondents must, therefore, review the facts from the beginning of this case.

The action was commenced on October 12, 1988, against Tony Alamo ("Alamo")[1] and two corporate entities. The corporate entities were the Tony and Susan Alamo Foundation, purportedly a non-profit corporation organized under the laws of the State of California ("Foundation"), and Music Square Church, Inc., purportedly a non-profit corporation organized under the laws of the State of Tennessee ("Music Square"). Apdx. I at 228-29.[2] These corporations are hereinafter referred to collectively as the "Alamo corporations".

---

[1] Originally, four individuals in addition to Mr. Alamo were also named as defendants. Those four were later dismissed from the case for reasons not material to this appeal.

[2] The Petitioner has not served the Respondents with an Appendix, and cites to the Appendix before the Court of Appeals. The Respondents will, therefore, also cite to "Apdx. I" to refer to the Appendix in the first appeal taken to the U.S. Court of Appeals for the Eighth Circuit (*"Miller I"*), and to "Apdx. II" to refer to the Appendix in the second appeal to that Court (*"Miller II"*).

It was specifically alleged in the Complaint that the corporate entities were vehicles through which Alamo perpetrated fraud (Apdx. at 235, ¶28), and that the corporate defendants were totally controlled by Alamo, used for his personal benefit, and that Alamo's control and domination was so complete that the corporate entities had no independent personality or existence of their own (Apdx. I at 235, ¶29).

Service of process by mail was attempted upon all defendants on October 24, 1988, pursuant to F.R.C.P. Rule 4(c)(2)(C)(ii), addressed to P.O. Box 398, Alma, Arkansas 72921. That was the address the defendants used on all of their business correspondence, and the defendants admitted this was their address, as they later argued to the District Court that this address was "known" to the plaintiffs as the address of the defendants. Apdx. I at 215:16-23. The Summons, Complaint and "Notice and Acknowledgment of Service" forms for all defendants except the Foundation were returned to the plaintiffs marked, "Not at this address – Return to sender." Apdx. at 295-301.

On November 16, 1988 an Answer was filed on behalf of the Foundation, Music Square **and Tony Alamo individually.** Apdx. at 37-38. However, counsel for the defendants subsequently contacted counsel for the plaintiffs and told them the answer on behalf of Alamo had been filed in error and advised that an amended answer would be filed. Apdx. II at 419-421. On March 27, 1988 an Amended Answer was filed by the defendants, deleting all reference to Alamo and to Music Square. Apdx. I at 57.

The plaintiffs therefore had no reason to attempt service upon Mr. Alamo between November 16, 1988 and March 27, 1988, since he had already filed an Answer. The Petitioner's references to the plaintiff's failure to attempt to locate a forwarding address for Mr. Alamo during that period, including references to an examination of the trial judge in an unrelated criminal prosecution of Mr. Alamo (Pet. at 3-5) are therefore misleading. Further, because the issue whether Judge Arnold's grant of additional time to effect service of process was not raised by the Petition on appeal to the Eighth Circuit, the issue is not preserved for further appeal to this Court, and these allegations are also immaterial.

Counsel for the Foundation then accepted service of process for Music Square, and Music Square filed an Answer on March 27, 1989. Apdx. I at 51. Hence, the Tony and Susan Alamo Foundation and Music Square Church, Inc. appeared by counsel, answered the complaint, and defended the action.

In the meantime, having been alerted to the fact that Mr. Alamo's Answer was filed in error and was being withdrawn by the attorney who filed it, the plaintiffs made a number of additional attempts to locate and serve Mr. Alamo personally. The plaintiffs attempted mail service at a second address, in Saugus, California, which was listed on some tracts published by Alamo. That service was also returned marked, "Return to Sender: Not Presently At This Address." Apdx. I at 292-301. The plaintiffs contacted Postal authorities in Alma, Arkansas in an effort to learn of any forwarding addresses for any of the other, individual defendants, who were known to be close to Mr. Alamo and who might have given some

indication of his whereabouts. The Postmaster responded that he was unable to provide any addresses. *Id.*

The plaintiffs also wrote to a law firm which had represented two of the individual defendants in a prior domestic relations case in California. The response of those attorneys was that the firm no longer represented any of the named individuals, did not know their whereabouts, and that they were also trying to find Alamo to serve him with process and could not. Apdx. at 329, 351-352.

The plaintiffs also served interrogatories upon each of the corporate defendants, seeking to learn the whereabouts of each of the individual defendants, including Mr. Alamo. The answers of the Foundation to those interrogatories indicated that the only information they had regarding the location of Alamo was that he was last known to reside at " . . . some hotel in Los Angeles." Apdx. I at 607 ¶10. The President of the Foundation further responded that no communications had been received from any of the defendants, including Mr. Alamo, so far as he could "recollect," (*Id.* at 607-609, ¶¶7, 9, 608 ¶¶17, 18, 26, 29, 32, 37), and that no W-2 or other tax forms had been issued to the individuals for the year prior to the action (*Id.* at 608 ¶¶15, 26, 37).

For its part, Music Square simply failed to respond to the plaintiffs' interrogatories at all. The plaintiffs then moved to compel answers to those interrogatories, and to again enlarge the time in which to serve the individual defendants. Apdx. I at 571-614. The District Court (per Beverly Stites, U.S. Magistrate) granted the plaintiffs additional time in which to serve the defendants. However, the court denied

the motion to compel discovery, and directed that the plaintiffs instead proceed pursuant to Rule 4 of the Arkansas Rules of Civil Procedure, as incorporated under F.R.Civ.P. Rules 4(c)(2)(C)(i) and 4(e). Apdx. at 286-288.

The plaintiffs then served Mr. Alamo by publication, in accordance with the applicable rules of civil procedure. Ark.R.Civ.P. Rule 4(f). Apdx. I at 302-322.

Throughout this entire period Alamo was a fugitive from justice. As is more fully set forth below, Mr. Alamo's fugitive status during the time the plaintiffs were trying to serve him, as well as the entire time through trial, appeal, and the plaintiffs' execution upon their judgment, was a matter of record at the time the Petitioner's motion under Rule 60(b) was filed.

Although Mr. Alamo argues that he had a "good faith belief" that he was not a fugitive from justice, he does not deny he was aware of the suit. Alamo admitted to the Court of Appeals that he was aware of the suit, but that he chose not to respond in the belief that he could challenge the judgment against him under F.R.Civ.P. 60(b) "at any time." Brief of Appellant, *Miller II*, at 22, 25-26.

After the publication period had run, none of the individual defendants appeared or otherwise responded to the complaint. The plaintiffs then filed an Application for Entry of Default and supporting Affidavit of Default (Apdx. at 324-357), and in due course a default was entered by the Clerk of the District Court against Mr. Alamo on August 17, 1989 (Apdx. at 358-363).

A hearing was then held on November 27-28, 1989 to determine the amount of Alamo's liability to the Millers.

Although the Petitioner is correct in noting that neither Mr. Alamo nor the Alamo corporations participated (Petition at 8), it is important to note that there is no allegation or proof that the defendants' failure to appear was due to a lack of notice or was the result of anything done by the District Court or by the plaintiffs.

After the hearing on the issue of the amount of Alamo's liability to the plaintiffs, the District Court deferred entry of judgment against Alamo, pending a determination of the liability, if any, of the corporate defendants.

The trial of the action against the corporations was bifurcated. The District Court determined to proceed first with a hearing on the question whether the corporate defendants were in fact entitled to legal recognition as distinct entities from Mr. Alamo, and then to try the issue of liability should the initial issue be decided favorably to the Alamo corporations. On March 6-7, 1990, the first phase of the trial of the corporate defendants was held. At the conclusion of the evidence, the District Court (Hon. Morris S. Arnold) found, *inter alia*, that in fact the corporate litigants enjoyed no existence separate and apart from Alamo, and that the corporations were shams, used by Alamo for his own purposes. Memorandum Opinion of April 19, 1990, *infra* at 46a, Judgment of April 19, 1990, *infra* at 27a. The District Court also found that the Foundation "was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo." *Id.*

Accordingly, on April 19, 1990, the District Court entered a judgment, declaring the corporate entities to be shams which were acting with respect to the Millers as

the "alter egos" of Alamo. The District Court further declared that any judgment in this case which would be entered against Alamo individually would lie against these corporate entities as well, and dismissed the corporations as parties. Judgment of April 19, 1990, *infra* at 27a.

On April 27, 1990, a money judgment was entered against Alamo and in favor of the plaintiffs in the amount of $1,448,549.00. Judgment of April 27, 1990, *infra* at 30a. Mr. Alamo never appealed this money judgment, and it became final.

The corporate litigants each appealed from the April 19, 1990 declaratory judgment. As part of their appeal the corporate defendants expressly raised and argued the issues of the sufficiency of service of process over defendant Alamo by publication (Apdx. II at 284, 292-95), as well as the collateral issue of the corporations' standing to raise this challenge to the District Court's jurisdiction over Alamo (Apdx. II at 292).

In their Brief, the Millers set forth the facts pertaining to their attempts to serve Alamo with process, the corporations' obstruction of discovery in regard to finding Alamo, and Alamo's knowledge of the litigation while he was hiding out. Apdx. I at 330-39. The Millers also briefed and argued the issue of the corporations' standing to challenge sufficiency of service upon Alamo. Apdx. I at 367-69.

Each of these issues was decided by the United States Court of Appeals on January 23, 1991. *Miller I*, *infra* at 33a. The Court of Appeals affirmed the District Court in all respects. It was specifically held that service of process by publication was correctly done and was valid, and, in

the alternative, that an appearance and defense by Alamo's "alter ego" corporate surrogates constituted an appearance by him which vitiated the need for service by publication. Id. at 33a.

The Petitioner states that the Court of Appeals did not "resolve the inconsistency" between its affirmance of the findings that none of the individual defendants filed an answer and that the entry of an appearance by Mr. Alamo's "alter ego" corporate entities constituted an entry of appearance by Mr. Alamo. Petition at 10. This falsely implies that there was or is an "inconsistency." In truth, there is nothing inconsistent about holding that Mr. Alamo entered an appearance but did not file an answer or otherwise defend, and was therefore placed in default.

Six months after the Court of Appeals affirmed the District Court, the Petitioner was finally located and arrested in Tampa, Florida. *U.S. v. Alamo*, CR-90-20008-1 (W.D.Ark. 1991). Three months after his arrest, on October 21, 1991, the Petitioner filed a motion for relief from judgment under Rule 60(b). It is the disposition of that appeal which is the subject of this Petition.

Pursuant to his Rule 60(b) motion, the Petitioner sought to re-argue the facts pertaining to service of process which were before the Court of Appeals on the first appeal. The Respondents objected to the re-argument of these facts on grounds that the issue was *res judicata* and also settled as the "law of the case." Apdx. II at 393-564. The Millers also objected to admission into evidence of

the excerpts from Judge Arnold's testimony in the criminal prosecution of Mr. Alamo,[3] unsworn statements of Alamo's followers, and like material, because they were hearsay and were otherwise not admissible under the Federal Rules of Evidence. Apdx. II at 565-77.

Although Alamo did embellish his arguments with some assertions claims not raised prior to the first appeal, he did not allege that any of the additional "facts" he wished to prove were not known to him prior to entry of the monetary judgment against him on April 27, 1990. Alamo did, however, allege that he "believed in good faith that he was not a fugitive" at the time the plaintiffs were attempting to serve him with process. This claim

---

[3] At one point Petitioner was charged with threatening the life of the trial judge, the Hon. Morris S. Arnold. That charge arose as a result of statements Alamo made in publications and on audio tapes, while he was still a fugitive. Mr. Alamo's remarks referred to the entry of the judgment against him in this case, and resulted in the issuance of an additional arrest warrant for him. *United States v. Tony Alamo*, CR-90-20008-1 (W.D. Ark. 1991). The remarks of Judge Arnold quoted in the Petition here are from the transcript of the trial on that criminal charge. When the Petitioner proffered them in the District Court, the Respondents objected and moved to strike them, on grounds that one cannot disregard the actual record in a case and instead rely upon the off-hand recollections of the trial judge while being questioned in a different proceeding two years after the fact. Further, although Mr. Alamo did recite Judge Arnold's remarks in his appellate brief in this case, Mr. Alamo did not appeal Judge Arnold's order enlarging the time for the plaintiffs to serve process beyond the original 120 days allowed under F.R.Civ.P. 4(j). These remarks are, therefore, immaterial to the instant Petition.

was soundly rebutted by the record before the District Judge at the time of the motion. The District Court had previously found that Mr. Alamo was a fugitive from justice (Transcript of Court's Ruling, March 7, 1990, Apdx. II at 582), and this fact was recognized and relied upon by the Court of Appeals. *Miller I, infra* at 40a. These findings were amply supported by evidence of record:

1. One of the warrants for Alamo's arrest was for felony child abuse, issued by the State of California as a consequence of Mr. Alamo having directed a severe beating of Justin Miller.[4]

2. The District Court was asked to take judicial notice of an arrest warrant issued by the same Judge of the same District Court for Mr. Alamo, on a contempt citation previously issued by the District Court in *Elizabeth Hanford Dole v. Tony and Susan Alamo Foundation, et al.*, Civil Action No. 77-2183 (W.D. Ark.). Apdx. II at 2-4.

3. The District Court was asked to take judicial notice of the proceedings in *United States v. Tony Alamo, supra,* in which Mr. Alamo's fugitive status is discussed.

4. Exhibits introduced at the trial held in this case on March 6-7, 1990, contain explicit references by Mr.

---

[4] This was one of the claims asserted in the original complaint, and judgment was ultimately entered in this case that Mr. Alamo and the corporate defendants were liable for this beating. Memorandum opinion, *infra* at 45a. The criminal charge is still pending in the State of California.

Alamo to the arrest warrants issued for him by authorities in Los Angeles County, California. Mr. Alamo discussed the arrest warrants issued for him in transcribed interviews in April, 1988, six months before this action was filed, (Michael Jackson Show, KABC Radio A.M., April 1, 1988, Apdx. II at 473-474, 478), and again in September, 1989, eleven months after this action was filed, ("Talk Radio," KLIF, September 26, 1989, Apdx. II at 498-499).

5. There was testimony of record by Robert Miller and Carey Miller regarding Mr. Alamo being a fugitive following complaints over the beating of Justin Miller. Transcript of Proceedings of November 27-28, 1989, Testimony of Carey Miller, at 117; Transcript of Proceedings of November 27-28, 1989, Testimony of Robert A. Miller at 165-166.

6. Mr. Alamo made express admissions in his own publications, in which he discussed this case and asserted that, "[state and federal agencies, prosecutors, judges and other authorities] have turned it around to where we're the bad guys (child abusers) **and fugitives from justice** and the Millers are the good guys." Tract Entitled "NAILED," Trial Exhibit No. 57, Apdx. at 517 (emphasis added).

In addition, the Respondents established before the District Court that subsequent to the affirmance of the judgment by the Court of Appeals, the plaintiffs undertook the substantial effort necessary to execute upon their judgment. As part of that effort, the plaintiffs filed several law suits in various jurisdictions in order to set aside fraudulent conveyances of property by Alamo's corporate

shells. Among those fraudulent conveyance actions were two state court actions. *Robert A. Miller, et al. v. Tony Alamo, et al.*, Civil Action No. CV90-15200 (Superior Court of the State of Arizona, In and For the County of Maricopa) ("Arizona Case"), Apdx. II at 590-618; and *Robert A. Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, No. E-90-284 (I) (Chancery Court of Crawford County, Arkansas) ("Arkansas Chancery Case"). Apdx. II at 619-34.

In each of those suits in state courts it was separately alleged, under a different count in each respective complaint, that the corporate forms of the Tony and Susan Alamo Foundation and Music Square Church, Inc. were sham corporations acting as mere "alter egos" for Alamo. See: Complaint in Arizona Case, Count II, at ¶¶16, 17, Apdx. II at 598; Complaint in Arkansas Chancery Case, Count II, at ¶¶16, 17, Apdx. II at 631. Further, in each of those cases the courts found that there had been service by publication on Alamo. Apdx. II at 550, 648. Indeed, during the proceedings on the Rule 60(b) motion, Alamo admitted through his attorney that he had been served by publication in the Arizona case. Apdx. II at 193.

In the Arizona Case the Court ultimately adjudged:

> 8. That the corporate form of Twentieth Century Holiness Tabernacle Church, Inc. and **Tony Alamo and the other defendants set forth herein** [including but not limited to Music Square Church, Inc. and the Tony and Susan Alamo Foundation] **are declared to be one and the same, and all of said defendants are merely aliases and the alter-ego of said Tony Alamo,** and any Judgments which lie against the said

> Tony Alamo lie against said defendants. Apdx. II at 552 *infra* at 59a. (Emphasis added.)

In the Arkansas Chancery Case the court found that Alamo had been served by publication, and had defaulted. Apdx. II at 648. The court also found that Alamo was a fugitive from justice (Apdx. II at 648-49), and that Foundation and Music Square were appearing in the case only as surrogates for Mr. Alamo:

> Rather than protecting their own, legitimate interests, it is apparent to the Court that these two corporate entities, previously having been found to be nothing more than the tools and an extension of Tony Alamo, have appeared in this case as surrogates for Mr. Alamo. It is the law of this state that litigation must be carried only in the name of the "real party in interest." Ark. R. Civ. P. Rule 17. Moreover, for sound reasons of public policy, fugitives from justice, including Mr. Alamo, are prohibited from availing themselves of the processes of the courts of this and any state. *See: Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498 (1970). It would violate that policy to permit Mr. Alamo to remain a fugitive from justice and still appear in this case and defend through surrogate entities.

The plaintiffs further established that no appeal was taken from either the Arizona judgment or the Arkansas Chancery judgment, they had become final, and no motion to vacate either judgment ever filed by any defendant named in those cases. There was not even an allegation made before the District Court in this case of any defect(s) in service by publication existed in either of those cases. At the time of the Petitioner's motion to

vacate the judgment in this case,[5] the holdings in those rendered the "alter ego" issue *res judicata* as between the Petitioner and the Respondents here.

After extensive briefing and oral argument, on February 11, 1992 the District Court (Hendron, J.) denied the Petitioner's 60(b) motion:

> The Court has carefully examined the arguments of Alamo and plaintiffs in the context of the record including the *Miller* opinion [in the first appeal] and the applicable law. The Court has concluded that neither an evidentiary hearing nor further argument is required. It is not necessary to get bogged down in addressing all the fallacies of Alamo's arguments since plaintiffs have fully done so.[6] The bottom line is that the Eighth Circuit in *Miller* has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo. Alamo has simply not shown any basis for the Court to ignore and relitigate those factual and legal determinations. He is not entitled to another bite at the apple under the guise of

---

[5] And continuing to date.

[6] The Petitioner neglects to note that the District Court agreed with alternative grounds for rejecting Alamo's arguments which had been advanced by the plaintiffs, which were based upon logical defects and lack of factual support. These are the same arguments Mr. Alamo is now advancing as Petitioner here.

> imaginative, post-appeal variations that ultimately still challenge personal jurisdiction.

In the meantime, Mr. Alamo had filed another motion, seeking the turnover of unspecified documents which had been left behind by the Alamo corporations when realty was seized by the United States Marshal for the Western District of Arkansas pursuant to a writ of execution issued in this case. The Petitioner neglects to mention that an identical motion had previously been made to the District Court.

That motion, captioned "Motion for Order to Release Records", was filed on October 19, 1991, ostensibly on behalf of the Foundation and Music Square. The movant(s) sought to have the District Court:

> . . . enter an order directing that either the U.S. Marshalls Office of the individuals, parties,or entities having control of the aforesaid records, to release said records to the defendants, and authorizing defendants and/or their counsel to secure the aforesaid records and documents for the Tony and Susan Alamo Foundation and Music Square Church and to remove them from the Georgia Ridge Crawford County properties. "Motion for Order to Release Records" at 2, Apdx. II at 196 (emphasis added).

This motion was denied by the Court on October 21, 1991, on grounds that the movant(s) had cited no authority for directing those currently in possession of realty seized and sold at execution to turn over unspecified "records" previously abandoned there. Apdx. II at 201. No appeal was taken from the denial of that motion. Nothing further was heard from Alamo concerning the

records in question for another four months, until Alamo filed a virtually identical motion in his own name on February 14, 1992.

In the February 14, 1992 motion Alamo argued the District Court had "missed the point" in deciding the October 19, 1991 motion. "Defendant Alamo's Motion for Determination of Ownership of Records and for Order of Release" (hereinafter referred to as "Alamo's second motion") at 6, Apdx. II at 31. As with the first motion, Alamo still cited no legal authority in support of the motion.

The Millers filed an opposition to Alamo's second motion, on grounds that the issue of his right to enter on the premises then belonging to the Millers and remove documents was *res judicata* as a result of the order on the first motion. "Plaintiffs' Opposition to Defendant's Second Motion for Determination of Ownership of Records and for Order of Release" (hereinafter "Plaintiff's Opposition") at 2-5, Apdx. II at 56- 59. The Millers also maintained that by quitting the premises without taking any action to secure the documents, and by failing to show any interest in the documents for almost two years while the property at which the documents were stored was sold, Alamo had manifested an intention to abandon the documents, and the documents were now theirs to do with as they pleased. *Id.* at 5-7, Apdx. II at 59-61. Finally, the Millers noted that Alamo's professed sudden need for the documents was pretextual, and the true reason he wanted possession of all of the documents was to continue his proven practice of forging and destroying evidence in proceedings to which he or his corporate "alter egos" were parties. *Id.* at 5-7, Apdx. II at 59-61.

The District Court found that the first motion, filed on October 19, 1991, was "filed at Alamo's request." Order of April 24, 1992 at 1, Addendum to Brief of Appellant at 1. The District Court further noted that "Alamo has **once again** failed to cite any legal authority for his request." *Id.* at 2. The second motion was therefore denied.

An appeal of each of the above orders of the District Court was taken, and the two appeals were consolidated. The Eighth Circuit affirmed the District Court in all respects, and this Petition followed.

SUMMARY OF ARGUMENT AGAINST GRANTING THE WRIT

Petitioner's argument is that by refusing to "investigate" the facts in this case and decide whether Alamo the individual was a privy with the Alamo Corporations when the corporations appeared in this case, the District Court and the Eighth Circuit failed to "expose" *Miller I* as a "judicial Frankenstein's monster" which conflicts with *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). However, the District Court was not required to reexamine factual or legal issues which were both the law of this case and *res judiciata* as a consequence of the two judgments in Arizona and Arkansas.

Nor was it the responsibility of the Eighth Circuit to "investigate" Alamo's claims that the prior decisions were wrongly decided. The issue presented to the Court of Appeals was whether the District Court had abused its discretion in denying the Petitioner's motion under Rule

60(b), not whether the underlying case was correctly decided. In making that decision, the Eighth Circuit was surely correct in holding that the District Court could properly find that the issue of the identity between Alamo and the corporations was *res judicata*.

The Petitioner here is asking this Honorable Court to undertake a *de novo* review of the facts of this case, in order to find that something about the holding in *Miller I* compelled its reversal in *Miller II*. These facts have, however, been reviewed twice by the District Court, and twice by the United States Court of Appeals, and amply support that actions taken by those courts. The Petitioner's claim was adjudicated in three prior cases, and there is nothing in any prior decision of this Court which would require he be afforded a fourth opportunity to make his case.

ARGUMENT AGAINST ISSUANCE OF THE WRIT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE ISSUE OF THE CORPORATE LITIGANTS' IDENTITY AS SURROGATES FOR TONY ALAMO WAS *RES JUDICIATA*, AND NO FURTHER REVIEW OF THAT QUESTION WAS NECESSARY OR PERMISSIBLE.

A. When the petitioner appeared before the District Court and moved for relief from judgment under F.R.Civ.P. 60(b), the question of his identity with the corporate litigants was *res judiciata*.

Alamo's entire argument that the District Court could not properly follow *Miller I* on the issue of personal

jurisdiction hinges upon his claim that he was "not a party or in privity with a party" to this case when *Miller I* was decided. For this reason he devotes substantial effort to trying to convince each court along the line that he cannot be held to the previous findings in this case that the corporate litigants were in fact Alamo's "alter egos." However, the Petitioner neglects to address the two separate judgments in other cases between these same parties in which it was also held that the Foundation and Music Square are Alamo's "alter egos." Those judgments are each as binding upon Alamo as the judgment in this case, and since neither of those judgments have ever been challenged on any ground, it is not even arguable there is some defect in service of process which relieves Alamo from the judgments in those cases.

As Alamo admitted to the District Court below, the Millers instituted an independent action against the corporate entities *and Alamo* in an Arizona court on November 14, 1990. Apdx. II at 192-93, ¶13. In that action the Arizona Court ultimately adjudged that the Foundation and Music Square were the "alter egos" of Alamo. Alamo conceded that he was served in that action by publication. Apdx. II at 193, ¶14.

The Petitioner never raised any allegation before the District Court or the Court of Appeals that service in either the case in Arizona or the case in Arkansas was defective. Because the parties here are the same parties, and the claim at issue here is the same claim, it is fundamental and inescapable that the issue of Alamo's "alter

ego" relationship to the corporations is *res judicata*. *Nevada v. United States*, 463 U.S. 110, 129, 103 S.Ct. 2906, 2918 (1983) (and cases cited therein); *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990); *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982); *United States v. Euge*, 691 F.2d 379 (8th Cir. 1982). Thus, by the time Alamo made his 60(b) motion to the District Court he was, and he continues to be, precluded as a matter of law from arguing that the corporate litigants were not in privity with him when *Miller I* was decided.

When the Millers pointed this out to the District Court in opposition to Alamo's Rule 60(b) motion, Alamo responded with two arguments. First, he argued that the Arizona judgment, "was premised upon the entry of the default judgment of this Court [in the instant case] which Defendant Alamo claims is void for lack of personal jurisdiction over him." Apdx. II at 193, ¶14. Second, he argued that he had no actual knowledge regarding the Arizona judgment. Apdx. at 193, ¶14. The first contention is belied by the record, and the second is immaterial.

The fact that Alamo questioned personal jurisdiction over him in *this* case has nothing to do with the jurisdiction of the other two courts. Even if we were to assume, *arguendo*, that there was no personal jurisdiction over Alamo in this case, the record in each of the other two cases plainly discloses that in neither of them was personal jurisdiction predicated upon the judgment in this case. At no time did the Millers plead or seek to rely upon any form of collateral estoppel as a basis for any finding of any jurisdictional fact. Although there was

reference to these judgments in each complaint and in each resulting judgment, those references were only to establish the debt which the Millers sought to collect, and the Millers' right to collect it from assets of the ostensible corporations. Apdx. at 592-94, ¶¶7-9; Apdx. at 622-23, ¶¶8-9.

In each case the Petitioner defaulted, and by his default admitted all of the well pled factual allegations pertaining to his "alter ego" relationship with the two corporations in question in this case. The fact that those judgments were entered by default is of no legal significance here. A judgment entered by default has the same preclusive effects as one entered after an appearance and litigation on the merits. *Riehle v. Margolies*, 279 U.S. 218, 225 (1929); *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 707-708 (8th Cir. 1979); *Brown v. Kenron Aluminum and Glass Corporation*, 477 F.2d 526, 531 (8th Cir. 1973). A default judgment operates as *res judicata* and is conclusive as to whatever was essential to support the judgment in the prior case. *Morris v. Jones*, 329 U.S. 545, 500-551 (1946); *Riehle, supra* at 225.

Further, even if it were true these other judgments had been "based upon" the holdings in this case, and further assuming this case would be someday reversed, the Arizona judgment would still not be rendered void. In a case where a judgment is based upon an earlier judgment, reversal or other nullification of the first judgment does *not* automatically nullify the second judgment. *Reed v. Allen*, 286 U.S. 191, 52 S.Ct. 532 (1932); *Deposit Bank v. Frankfort*, 191 U.S. 499, 24 S.Ct. 154 (1903); Restatement of Judgments (2nd) § 16 (1982); *see also*, Restatement of Judgments (1st) § 44. While the Arizona and Arkansas

Chancery judgments would be "voidable" if they were based upon the judgment in this case and the judgment in this case were subsequently reversed, the state court judgments would not be void *ab initio*. Until the successive judgments would be challenged in proper proceedings, they would be valid and binding. Since they are not reversed, those judgments retain their force today, just as they did when Alamo's Rule 60(b) motion was before the District Court.

As for the claim that Alamo did not know about the Arizona suit, even if such were true, Alamo's lack of actual knowledge would not alter the result. The mere fact that one served by publication does not have actual knowledge of the suit does not render service ineffective. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950) (actual notice to missing defendants whose whereabouts are unknown not constitutionally required); *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989). The petitioner's plea that he did not have actual notice of the judgments in the state court cases was therefore immaterial to the *res judicata* issue.

The Petitioner failed to offer the District Court or the Court of Appeals any reason why the District Court's determination that the "alter ego" question was settled would not be correct based upon the state court judgments. Nor does he offer any such explanation to this Court. Since even the Petitioner has been forced to concede that the holding in *Miller I* would bind him "were he substantially (albeit not formally) . . . in privity with a party to that appeal" (Brief of Appellant in *Miller II* at 22), the District Court's decision to follow *Miller I* is fully justified in light of, *inter alia*, the state court judgments.

B. The fact that the status of the corporations as "alter egos" of Mr. Alamo was settled in prior litigation is a primary distinguishing factor between this case and *Zenith Radio Corporation v. Hazeltine Research, Inc.*

The Petitioner argues that the Court of Appeals' decision to affirm the District Court is inconsistent with this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 295 U.S. 100 (1969). This argument fails, however, for two reasons. First, the question whether service of process upon one party is sufficient service of process upon a second litigant was never actually presented in *Zenith Radio*. Second, the purported "alter ego" status of the non-appearing entity in *Zenith Radio* had never been litigated or decided, either by the trial court or by other courts in previous cases, as was the situation in the instant case. *Zenith Radio* is therefore distinguishable on its facts, and there is nothing inconsistent between that case and the holding of the Court of Appeals in this case.

The key fact in *Zenith Radio* is that Zenith Radio (as a counterclaimant) and HRI (the corporation which was actually named as a party on Zenith Radio's counterclaim), had entered into a *stipulation* to the effect that "for purposes of this litigation [HRI and its parent corporation, Hazeltine] will be considered to be one and the same company." *Id.* 295 U.S. at 108-109. It appears the purpose of the stipulation was to facilitate discovery and pleading (*Id.* 295 U.S. at 108, 111 n. 4), and it is clear the District Court did not consider Hazeltine a party to the case (*Id.* 295 U.S. at 110 n. 3).

Nevertheless, the District Court sought to hold Hazeltine liable for the ultimate judgment on the theory that the stipulation was "equivalent to an entry of appearance, or as consent to entry of judgment against it." *Id.* 295 U.S. at 110. This Court reversed, finding that "the stipulation on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them." *Id.* 295 U.S. at 110.

Thus, the facts and ultimate holding of the Supreme Court in *Zenith Radio* have nothing to do with jurisdiction based upon an adjudicated finding of "alter ego" status. Hazeltine was not named as a party in Zenith Radio's pleadings, and there was no suggestion in the pleadings or anywhere else in the case that HRI and Hazeltine were "alter egos." *Id.* 295 U.S. at 108. Even when Hazeltine made a post-verdict "special appearance," the issue of Hazeltine's status as an "alter ego" was not raised. *Id.* 295 U.S. at 112 n. 6.

These are critical distinctions. In the instant case, Alamo was named as a party to the litigation, and the complaint expressly alleged he and the corporations were "alter egos." Alamo now admits that he was aware that the case had been filed, and the record plainly shows he was aware of the issues in the case, including the fact that he was accused of operating the corporations as shams. The finding of "alter ego" status, far from being based upon a stipulation, was based upon evidence presented at a two-day trial on the question. It was the evidence presented at the trial which supported the District Court's holding that the corporations were acting merely as "alter egos" for Mr. Alamo.

The importance of this distinction was highlighted by this Court in the *Zenith Radio* opinion:

> **If the *alter ego* issue had been litigated,** and if the trial court had decided that HRI and Hazeltine were one and the same entity and the jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here. *Id.* 295 U.S. at 111 (*dictum*, emphasis added).

The fact is that in this case, and in two prior cases, the Petitioner had a full and fair opportunity to litigate the question whether the corporate litigants were actually mere extensions of himself. That issue was determined adversely to the Petitioner, and there is nothing in *Zenith Radio* which would require courts to allow him to litigate the issue again and again.

The instant case actually falls within the rule of those precedents which hold that where one named defendant is served with process, and it is later determined that a second named defendant is in reality nothing more than the "alter ego" of the first, jurisdiction over the second defendant can properly be predicated upon jurisdiction over the first. *See, e.g.: Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Management, Inc.*, 519 F.2d 634, 637-638 (8th Cir. 1975) (where a corporation is the alter ego of the stockholders, jurisdiction over the corporation will support jurisdiction over the stockholders); *Certified Building Products v. National Labor Relations Board*, 528 F.2d 968 (9th Cir. 1976) (per curiam) (where record supported N.L.R.B.'s finding that corporation was "alter ego" of

individual corporate principal, service upon the corporation was equivalent of service upon the individual); *I.A.M. National Pension Fund v. Wakefield Industries*, 699 F.2d 1254, 1259 (D.C. Cir. 1983) (and authorities cited therein) (service of process upon purported domestic subsidiary of foreign corporation effective as to foreign corporation where corporations were not in truth separate entities); *Minnesota Mining and Mfg. Co. v. ECO Chem., Inc.*, 757 F.2d 1256, 1265 (Fed. Cir. 1985) (service upon predecessor corporation which was "alter ego" of successor, effective on successor company); *Bally Export Corp. v. Balicar Ltd.*, 804 F.2d 398, 401 (7th Cir. 1981), (service upon one corporation which was ultimately found to be the "alter ego" of second corporation was sufficient as to both); *N.L.R.B. v. Denna Artware, Inc.*, 310 F.2d 470 (6th Cir. 1962) (individual owner of "alter ego" corporation deemed served if "alter ego" served). *Zenith Radio, supra,* does not hold to the contrary.

II. SIMILARLY, THE PETITIONER WAS PROPERLY BARRED UNDER THE DOCTRINE OF *RES JUDICATA* FROM ATTEMPTING TO RELITIGATE HIS CLAIM THAT DOCUMENTS ABANDONED BY THE CORPORATIONS IN PREMISES SEIZED IN EXECUTION SHOULD BE TURNED OVER TO HIM, A YEAR AFTER THE PROPERTIES WERE DISPOSED OF.

This appeal, as well as the underlying motion before the District Court, are but two more examples of Alamo's consistent practice of relitigating any claim which is decided adversely to him, in total disregard of the doctrine of *res judicata*. The question of Alamo's right to

retake possession of documents and records which were left on Georgia Ridge in February, 1991, was litigated and decided in October, 1991. If Alamo was unsatisfied with that ruling, his remedy was to take a timely appeal. Instead, he waited four months and filed the same motion again.

In his second motion Alamo did not claim he had any new grounds, either factual or legal, which were not known to him when he first petitioned the District Court. Rather, Alamo sought only to embellish the grounds he asserted the first time around, explaining to the District Court that the U.S. Magistrate Judge simply "missed the point" of his first petition. Apdx. II at 31. Even if such were in fact the case, however, Alamo's remedy was to file a timely appeal, not to wait four months and try again. *Poe v. John Deere Co., supra; United States v. Young,* 806 F.2d 805, 806 (8th Cir. 1986) (Rule 60(b) motion not a substitute for appeal), *citing Hoffman v. Celebrezze,* 405 F.2d 833, 836 (8th Cir. 1969).

It could hardly be more settled that an issue litigated and decided between given parties is *res judicata* between them, and that issue cannot ever be relitigated between those parties or their privies. *E.g., Nevada v. United States, supra,* (and cases cited therein); *Poe v. John Deere Co., supra,* (8th Cir. 1982) (cases cited therein). This bar is complete, and prevents relitigation based upon the grounds actually asserted, as well as any new ground which was not asserted but which could have been. *E.g., Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940); *Poe, supra* at 1105.

By the time Alamo made his second motion to obtain the corporate records, the question whether Alamo was "in privity" with the corporate entities was long since settled. Even putting aside the fact that the corporations' status as the "alter egos" of Alamo was the law of this case, it was *res judicata* as a consequence of the state court judgments. The October 19, 1991 motion sought exactly the same relief as was sought in the February 18, 1992 motion. The Petitioner was therefore bound by the first ruling of the District Court to the same extent as if it had been brought in his own name.

The Petitioner's second motion addressed to the records he was claiming was therefore properly denied by the District Court on grounds that, among other things, the Petitioner was barred as a matter of law from relitigating his claim. The record before the Court of Appeals amply demonstrated this state of affairs, without need for oral argument or a rehash of Alamo's machinations.

CONCLUSION

The Petitioners' convoluted and sophistical arguments have now been reviewed by two United States District Judges and six judges of the United States Court of Appeals for the Eighth Circuit, none of whom has seen any merit in any of them. Should this Court deem it desirable to review these arguments yet another time, it will be the honor of the undersigned's career to appear and argue the case. But in truth there are many, many cases much more deserving of this Honorable Court's

time and attention. The Respondents therefore respectfully maintain the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PETER N. GEORGIADES, ESQ.
WILE, GEORGIADES, HOMYAK
& NORKUS, P.C.
1300 Gulf Building
Pittsburgh, PA 15219
(412) 391-3434

Counsel of Record for Respondents.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1447WA
No. 92-2205WA

Robert A. Miller; Kody Miller, by Robert A. Miller; Robert Miller, by Robert A. Miller; Carey Miller; Jeremiah Justin Miller, by Carey Miller; Rick Miller; James Miller,

Appellees,

v.

Tony Alamo, also known as Tony Fernando, also known as Tony Fernando Alamo, also known as Bernie Lazar, also known as Bernie Hoffman, also known as Bernie Lazar Hoffman, also known as Boris Lazar, also known as Papa Tony, individually and as officer & director of Tony & Susan Alamo Foundation & Music Square Church,

Appellant.

Appeals from the United States District Court for the Western District of Arkansas.

[UNPUBLISHED]

Submitted: November 12, 1992

Filed: November 19, 1992

Before FAGG, BEAM, and HANSEN, Circuit Judges.

PER CURIAM.

Tony Alamo appeals adverse rulings of the district court in these combined cases. Having reviewed the record and the parties' briefs, we conclude the issues raised on appeal do not require further consideration. The district court's rulings are clearly correct. We affirm the district court. *See* 8th Cir. R. 47B.

[2] A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO FOUNDATION, ET AL. DEFENDANTS

ORDER

On October 21, 1991, Tony Alamo (Alamo) filed a motion to dismiss or set aside the default judgment entered on April 27, 1990, and for return of property sold as a result of that judgment. The afternoon of November 12th, Alamo filed a motion for temporary restraining order (TRO) along with a motion for preliminary injunction. He sought to restrain the U.S. Marshal, the plaintiffs and the buyers of the auctioned property from disposing of, degrading the value of or selling any property obtained as a result of this case until the Court could rule on his motion to set aside and vacate the default judgment. The Court held a telephonic conference the morning of November 14th.

By order filed on November 15th reflecting the rulings announced at the conference, the Court denied the November 12th motion for TRO and noted the parties had stipulated that there would be a merger of the motion for preliminary injunction with a decision on the merits of the motion to set aside. Alamo was directed to file his brief by November 25th on whether the [2] holdings in *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143 (8th Cir. 1991) (*Miller*) that the district court had

personal jurisdiction of Alamo and that the corporate entities were his alter egos are dispositive of his motion with replies to Alamo's brief to be filed by December 2nd. The Court stated that once all the briefs were filed a review of the file would be made to determine if a ruling could be made on the record without additional testimony or argument.

On November 22nd, plaintiffs filed a response to the motion for return of property. They argue that if Alamo is correct in his assertion that the property is his, then he is admitting that the Court was correct in findings that the corporations were acting as his "alter egos." They continue that if Alamo is instead arguing that the corporations are distinct and separate entities from him, then he is not the proper party to demand the property's return.

On November 26th, Alamo filed his brief on the Eighth Circuit decision. He argues that the issues presented by his October 21st motion were not litigated in the Eighth Circuit, that this Court is not prohibited from addressing the merits of a Civil Procedure Rule 60(b) motion after an appeal, that he would be denied due process if the prior judgment is considered binding on him since he was a non-party, that there is no privity between himself and the corporate entities, that the doctrine of res judicata does not apply to a direct attack on the judgment, that the corporate entities lacked standing to raise the issue of whether there was [3] jurisdiction over him, and that even if plaintiffs had complied with Arkansas' provision for service by publication, such rule was constitutionally deficient as applied in this case.

He filed his response on November 27th to Plaintiffs' November 12th objection and motion to strike exhibits that were attached to his October 21st motion. He asserts that the exhibits constitute an offer of proof of what evidence would be presented at an evidentiary hearing.

On November 29th, he filed a reply on the motion for return of property that if the default judgment is set aside, then plaintiffs have no legal right to the property regardless of whether he or the corporate entities own the property. That same date, he filed a supplement to his November 26th brief adding the argument that his liability for the damages awarded to plaintiff was not briefed or considered on appeal.

Plaintiffs filed a combined response to the motion to dismiss/motion to set aside and vacate default judgment and their brief regarding the Eighth Circuit decision. The brief first deals with Alamo's argument that the claims against him should be dismissed since he was not served within 120 days and then discusses the service by the warning order. Besides responding to the points raised by Alamo, plaintiffs discuss the preclusive effects of the prior litigation, his failure to meet the burden of proof, and the issues of waiver and estoppel due to Alamo's affirmative misconduct.

[4] Alamo filed a reply on December 5th attaching transcript portions of the detention hearings held in Alamo's criminal case. That same date, plaintiffs filed an opposition to Alamo's November 29th supplemental brief on both timeliness and substantive grounds.

On December 6th, plaintiffs filed a reply on the motion for return of property. Their surreply on the

motion to vacate was filed on December 12th attacking the admissibility of the exhibits to Alamo's December 5th pleading.

The Court has carefully examined the arguments of Alamo and plaintiffs in the context of the record including the *Miller* opinion and the applicable law. The Court has concluded that neither an evidentiary hearing nor further argument is required. It is not necessary to get bogged down in addressing all the fallacies of Alamo's arguments since plaintiffs have fully done so. The bottom line is that the Eighth Circuit in *Miller* has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo. Alamo has simply not shown any basis for the Court to ignore and relitigate those factual and legal determinations. He is not entitled to another bite at the apple under the guise of imaginative, post-appeal variations that ultimately still challenge personal jurisdiction.

[5] On December 6th, plaintiffs filed a motion to strike the appearance of the corporate entities through Roy Gean, III. They ask that all parties be relieved from serving anyone purporting to represent Music Square Church, Inc. and/or Tony and Susan Alamo Foundation since those entities have no existence separate from Alamo. In particular, plaintiffs are concerned that the reappearance of Gean in the certificates of service might be used by Alamo as a waiver by plaintiffs or demonstrating inconsistent action by the Court. Attached as an exhibit is Gean's February 25, 1991 letter explaining why

he would no longer be participating in the proceedings. No response to this motion has been filed. Besides the points made in plaintiffs' motion, the Court notes that Gean did not participate in the November 14th telephonic conference. Plaintiffs' arguments and concerns are well taken and the motion to strike the appearance of the previously dismissed corporate defendants will be granted.

Finally, it appears that there is an outstanding motion filed by plaintiffs on August 1st for attorney's fees and costs under the Equal Access to Justice Act (EAJA) against the United States. This motion is referred to U. S. Magistrate Judge Stites for recommended disposition.

Accordingly, Alamo's October 21st motion to dismiss or, in the alternative, to set aside and vacate default judgment and for return of property is denied. As Alamo's motion for preliminary injunction was merged with the merits of the October 21st motion, the November 12th motion for preliminary injunction is denied. [6] Since the exhibits do not affect the Court's ruling, plaintiffs' November 12th motion to strike exhibits is denied. Plaintiffs' December 6th motion to strike the appearance of the previously dismissed corporate defendants is granted. Plaintiffs' August 1st motion for attorney's fees and costs under EAJA against the United States is referred to Magistrate Judge Stites for recommended disposition. Unless the parties notify the Court in writing within 15 days from the file-date of this order of any outstanding motion not addressed by this order, such motion will be deemed moot.

IT IS SO ORDERED this 11 day of February, 1992.

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

U. S. DISTRICT COURT
WESTERN DIST.
ARKANSAS
FILED
FEB 12 1992

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP, on 2-12-92 by MSJ

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO
FOUNDATION, ET AL. DEFENDANTS

ORDER

(Filed April 27, 1992)

On February 18th, Alamo filed a motion for determination of ownership and the release of records seized by the U.S. Marshal Service during the execution of the money judgment in favor of the plaintiffs. This motion is supported by exhibits. Plaintiffs responded on February 25th and also moved for imposition of sanctions. Alamo filed a reply to his motion that also responded to the request for sanctions on February 28th. Plaintiffs filed a reply to their sanctions motion on March 5th. Alamo filed a supplemental response on sanctions on March 13th and plaintiffs filed a sur-reply on April 2nd.

On October 17th, a motion for order to release records so they could be used in another case was filed at Alamo's request. After the matter was referred to Magistrate Judge Stites for disposition, the motion was denied by order filed on October 21st on the ground that no legal authority for the unusual request had been presented. Plaintiffs argue that in light of the October [2] 21st decision, Alamo should be assessed sanctions for trying to relitigate this issue.

The records at issue were left on properties that were executed upon in February of 1991 and later sold to plaintiffs at execution sale in this case. Alamo has once again failed to cite any legal authority for his request. The motion for determination of ownership of records and for order of release is denied. However, the Court is persuaded that sanctions are not warranted and so plaintiffs' motion for imposition of sanctions will be denied.

Finally, plaintiffs filed a third petition for allowance of attorney's fees and costs on February 26th. No response to this petition has been filed. This petition is referred to Magistrate Judge Stites for recommended disposition.

Alamo's February 18th motion for determination of ownership of records and for order for release and plaintiffs' February 25th motion for imposition of sanctions are denied. Plaintiffs' February 26th third petition for allowance of attorney's fees and costs is referred to Magistrate Judge Stites for recommended disposition.

IT IS SO ORDERED this 24 day of April, 1992.

This document entered on docket in compliance with Rule 58 and 79(a), FRCP,

on 4-27-92 by MSJ

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

Robert A. MILLER; Kody Miller by Robert A. Miller; Robert Miller by Robert A. Miller; Carey Miller; Jeremiah Justin Miller by Carey Miller; Rick Miller; James Miller; Claudia Greiner; Ave Maria Askey; Nanette Miller, Appellees.

v.

TONY AND SUSAN ALAMO FOUNDATION, Appellant,

t/d/b/a Southwest Business Management Co., Tony and Susan Alamo Christian Foundation, Holy Alamo Christian Church, Alamo Builders Emporium of Alma, Ark., Alamo Candy Company, Alamo Construction Company, Alamo Electric of Alma, Ark., Alamo Expert Roofing of Fort Smith Ark., Alamo Land Development Company of Alma, Ark., Alamo Plumbing of Alma, Ark., Tennessee Country Boy Distributors & TCB Distributors;

Music Square Church, Appellant.

t/d/b/a Alamo Mini Mart, Holiness Tabernacle Christian School, Alamo of Nashville in Alma, Alamo Ready Mix, Alamo Discount Grocery, Hartford Advertising, Alamo Freight, Alamo Farms, Alamo Restaurant, Alamo Kerr-McGee Transmission Shop, Alamo DX, & End Times Books; Tony Alamo, a/k/a/ Tony Fernandoi,a/k/a Tony Fernando Alamo, a/k/a/ Bernie Lazar, a/k/a Bernie Hoffman, a/k/a Bernie Lazar Hoffman, a/k/a Boris Lazar, a/k/a Papa Tony, ind. & as officer & dir. of Tony & Susan Alamo Foundation & Music Square church; Marc Lundgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Tommy Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Carol Ann Miller, a/k/a Carol Ann [144] Landgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Susan L. Miller a/k/a Susan Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church.

No. 90-1826.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 10, 1990.

Decided Jan. 23, 1991.

Plaintiffs brought suit against four individuals and two alleged corporate entities, alleging violations of the Fair Labor Standards Act, the Davis-Bacon Act, and the Arkansas minimum wage law. Other counts alleged various common-law torts perpetrated against defendants. The United States District Court for the Western District of Arkansas, Morris Sheppard Arnold, J., ruled that corporate entities were alter egos of individual defendant, and entered personal judgment against individual defendant in the amount of $1,448,549. Corporate entities appealed. The Court of Appeals, Henry Woods, District Judge, sitting by designation, held that: (1) district court did not err in disallowing testimony of defense witnesses; (2) court properly denied motion for recusal; (3) court had personal jurisdiction over defendant under the Arkansas Long Arm Act; and (4) evidence supported finding that alleged corporate entities were alter egos of individual defendant.

Affirmed.

See also 748 F.Supp. 695.

* * *

[145]

* * *

Roy Gean, Fort Smith, Ark., for appellant.

Peter Georgiades, Pittsburgh, Pa., for appellees.

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOODS,* District Judge.

HENRY WOODS, District Judge.

The Plaintiffs, Robert A. Miller, et al., filed this suit in the Western District of Arkansas against Tony Alamo, three other individual associates, and two alleged corporate entities, the Tony and Susan Alamo Foundation (hereafter "Foundation") and Music Square Church Inc. The first two counts of the complaint were based on the Fair Labor Standards Act, 29 U.S.C. § 206, et seq. and the Davis-Bacon Act, 40 U.S.C. § 276a, et seq. Count III of the complaint was based on the Arkansas minimum wage law, and the remaining counts alleged various common-law torts perpetrated against the plaintiffs. In an amended complaint the plaintiffs alleged diversity of citizenship. It was also alleged that the corporate entities were vehicles through which Tony Alamo perpetrated fraud (App. 8, 24), that the corporations were totally controlled by Tony Alamo and used for his personal benefit, and that this control and domination was so complete that the corporate entities had no independent personality or existence of their own (App. 12, 40).

---

* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

The Foundation and Music Square Church, Inc. answered through joint counsel. None of the individual defendants answered although all were served in accordance with the applicable statute and Federal and State Rules of Civil Procedure. Since none of the individuals filed an answer, a default was entered against each of the individual defendants on August 17, 1989. No action has been taken regarding the default, and no appeal has been perfected therefrom. The issues with respect to the independent existence of the Foundation and Music Square Church, Inc., apart from Tony Alamo, were set for trial on March 5, 1990. After a two-day trial to the court, during which nine witnesses appeared for the plaintiffs and none for the defendants, as a result of the imposition of sanctions, the district court[1] made findings from the bench. They may be summarized as follows:

1. There was "abundant evidence" that the corporate defendants enjoyed no existence separate and apart from Tony Alamo.

2. There was no evidence that the Foundation was ever even incorporated, but even if it was, the Foundation was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo.

3. The corporations were shams, used by Tony Alamo for his own purposes.

4. Tony Alamo moved corporate assets into and out of the corporations, and between them,

---

[1] The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas.

at will, and without regard to any ownership interest by the corporate entities.

5. Tony Alamo appointed and removed corporate officers at his personal whim.

6. Tony Alamo held out to the public that there was no distinction between himself and the corporations.

7. Corporate books and records were manufactured and destroyed, in a fraudulent manner, solely on the command of Tony Alamo.

[146] 8. Corporate officers and boards, and the corporate form in general, were ignored by Tony Alamo.

9. The corporate defendants were simply extensions, or "alter egos," of Tony Alamo.

The district court entered its order and judgment on April 19, 1990, providing *inter alia*:

> [D]efendants Tony and Susan Alamo Foundation and Music Square Church, Inc., were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation.
>
> . . . .
>
> . . . Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony

> and Susan Alamo Foundation and Music Square Church, Inc. as well.

(App. 191-192). The Foundation and Music Square Church, Inc. appealed from this judgment, raising four points: (1) The district court erred in disallowing the testimony of certain defense witnesses; (2) the district judge should have recused; (3) the district court did not have personal jurisdiction over Tony Alamo; and (4) the court erred in finding that the Foundation and Music Square Church, Inc. were alter egos of the individual defendant Tony Alamo. We affirm.

I. REJECTION OF TESTIMONY FROM DEFENSE WITNESS

Appellants argue that the district judge abused his discretion in sustaining plaintiff-appellee's motion to exclude the testimony of all eight of the witnesses named in defendants' "Pre-Trial Information Sheet." The bases of appellee's motion were: (1) that the defendants should not be permitted to use witnesses who were first identified two business days before trial; and (2) that those witnesses who had been previously identified by name should be excluded because the defendants had failed to disclose their addresses, despite two prior orders of the court compelling them to do so.

In granting the motion, the court made the following findings:

> 1. The defendants had ignored orders of the Court requiring that they provide the addresses of prospective witnesses. (App. 217-18).

2. The defendants had willfully disobeyed the Court's orders for the purpose of causing delay and confusing the plaintiff's case preparation, and had "committed themselves to a course of obstruction." (App. 223-24).

3. By their conduct in disobeying the Court's orders and attempting to confuse the case, the defendants had displayed contempt for the Court. (App. 224:1-2).

4. The defendants' transgressions had been repeated, and had consumed too much of the Court's time. (App. 224).

These findings are fully supported by the record, which is replete with instances of evasion, obstruction, and contumacy by the appellants. We find no abuse of discretion in granting appellee's motion.

II. RECUSAL OF THE DISTRICT JUDGE

Two days before the trial, appellants made a "Motion to Disqualify Presiding Judge" because "his prejudice in favor of the plaintiffs precludes the defendants from obtaining a fair and impartial trial." The only evidence presented in support of the motion consisted of two newspaper articles concerning a court proceeding. The motion was denied because it came too late and the two newspaper articles were inaccurate. There are two statutes dealing with judicial recusal – 28 U.S.C. § 455(b)(1) and 28 U.S.C. § 144. Section 455 has been interpreted to require a party to make its motion and facts known at the earliest possible time. *United States v. Kelly*, 519 F.Supp. 1029 (D.Mass.1981); *Bradley v. Milliken*, 426 F.Supp. 929 (E.D.Mich.1977); *In Re Bokum Resources Corp.*, 26 B.R. 615

(Bkrtcy.D.N.Mex.1982). Clearly, the [147] matter was known to the defendants when the newspaper articles, which constituted the entire basis for the defendants' motion, were published, which was in November, 1989. This delay was totally unexplained.

Section 144 requires that an affidavit be filed ten days before the beginning of the term. No affidavit was filed here. The newspaper articles, which were rank hearsay and demonstrably inaccurate, did not constitute a basis for recusal. The district judge properly denied the motion.

III. VALIDITY OF PERSONAL JUDGMENT AGAINST TONY ALAMO

Appellants argue that no personal judgment could be rendered against Tony Alamo. After the default was entered, the district judge took testimony on damages and entered a personal judgment against Tony Alamo in favor of the plaintiffs in the total amount of $1,448,549. *See Miller v. Tony and Susan Alamo Foundation*, 748 F.Supp. 695 (W.D.Ark.1990). No appeal has been perfected from this judgment. Appellants' attorney does not represent Alamo.

It may be noted in passing that service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with Ark.R.Civ.P. Rule 4(f) The rule reads:

> Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order

> issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors.

The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. (App.289-306). The summons and complaint were duly mailed. (App. 306-322). The warning order was issued by the Clerk and duly published. Service was properly perfected upon Alamo, according to the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure. Rule 4(c)(2)(C)(i) Fed.R.Civ.P. permits service to be made "pursuant to the law of the state in which the district court is held."

Once service was properly made, personal jurisdiction was obtained against Alamo under the Uniform Long Arm Act, A.C.A. § 16-4-101, *Et seq.* (1987). This Act permits personal jurisdiction over one who has "committed a tortious act within the state." A.C.A. § 16-4-101(C)(1)(c) (1987). Here the principal portion of the damages assessed by the district judge resulted from a vicious beating administered by Alamo to two of the child plaintiffs in the presence of a large congregation of his cult followers. Another component of the damage award was the tort of alienation of affections. The Uniform Long Arm Act, after setting forth various methods of obtaining service, states: "This section does not repeal

or modify any other law of this state permitting another procedure for service." A.C.A. § 16-4-102(E) (1987). *Horne v. Savers Federal Savings & Loan Association*, 295 Ark. 182, 747 S.W.2d 580 (1988) addressed precisely the issue now before us. In that case jurisdiction was also asserted under the Uniform Long Arm Act, *supra*. Service was first attempted under Rule 4(e) of the Ark.R.Civ.P. which incorporates A.C.A. § 16-4-102(A)(1) (1987). After making every attempt to serve the defendant, just as appellees did in the instant case, the plaintiff in *Horne* was relegated to the provisions of Rule 4(f). The service was upheld along with *in personam* jurisdiction:

> Appellants next challenge the chancellor's decision that appellee's service of process under ARCP Rule 4(f) was legally sufficient to give the Arkansas court in personam jurisdiction over them. Again, the appellants are wrong. . . .
>
> . . . .
>
> [148] Under the circumstances demonstrated here, appellee was denied in its efforts to give appellants actual or personal service provided for out-of-state persons under the methods set forth under Ark.Code Ann. § 16-4-102(1) (1987) and ARCP Rule (e). As a consequence, appellee was relegated to obtain service of process on appellants under Rule 4(f), which is another effective procedure for service under § 16-4-102, Arkansas's long-arm law. *See* Ark.Code Ann. § 16-4-102(E), (which provides this section does not repeal or modify any other law of this state permitting another procedure for service).

747 S.W.2d at 582-83.

This case is dispositive of appellants' argument that there was no *in personam* jurisdiction over Tony Alamo under A.C.A. §§ 16-4-101 and 102 and Rule 4(f). The Supreme Court of Arkansas specifically rejected the same arguments that appellant has made with regard to the applicability of A.C.A. § 16-58-119, holding that Rule 4(f) applied and not this particular statute. As also provided in the Uniform Long Arm Act, domicile is a basis for personal jurisdiction. A.C.A. § 16-4-101(B). Such a jurisdictional basis is constitutional. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Undoubtedly Alamo was a domiciliary at the time the cause of action arose.

There is another basis for personal jurisdiction over Alamo. The Foundation and the Music Square Church have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities constituted an entry of appearance by Tony Alamo.

IV. SUFFICIENCY OF EVIDENCE TO ESTABLISH THAT ALAMO WAS AN ALTER EGO OF THE ALLEGED CORPORATIONS

Appellants argue that the evidence was insufficient to establish that the two alleged corporate entities were the alter egos of Tony Alamo. The district court's findings on the issue have been set out, *supra*. Appellants have utterly failed to sustain the burden that these findings were clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Their approach is to attack the credibility of the witnesses as "disgruntled former associates of the corporate defendants." At least

two of the witnesses were not associates of Alamo. One was a reporter for the *Los Angeles Times*. At any rate, the credibility of these witnesses was a matter within the province of the district judge. We find that each of the court's findings was sustained by abundant evidence. The testimony of the witnesses stands unrebutted in the record.

We affirm the judgment of the district court.

United States Constitution,
Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

United States Constitution,
Fourteenth Amendment

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * .

Arkansas Rule of
Civil Procedure 4 (f)

(f) **Service Upon Defendant Whose Identity or Whereabouts is Unknown:** (1) Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors. (2) In all actions in which the plaintiff has been granted leave to proceed as an indigent without prepayment of costs, where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and conspicuously posted for a continuous period

of 30 days at the courthouse or courthouses of the country wherein the action is filed and by mailing by the plaintiff or his attorney of a copy of the complaint and warning order to the defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee.

Federal Rule of Civil Procedure 55

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

* * *

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor * * * . If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment

by default has been entered, my likewise set it aside in accordance with Rule 60(b).

* * *

Federal Rule of Civil Procedure 60(b)(4)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void * * * .

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, et al., Plaintiffs,	:	C.A. No. 88-2206 (Arnold, J.)
vs.	:	
TONY AND SUSAN ALAMO FOUNDATION, et al., Defendants.	:	

/

ORDER AND JUDGMENT

This matter came before the Court upon a motion by the plaintiffs for entry of a declaratory judgment in accordance with the Court's findings at the close of the evidence in this case on March 7, 1990, and for subsequent dismissal of the corporate defendants as independent parties to this litigation.

The question whether the corporate forms of the corporate defendants in this case should be set aside was determined after a full trial on the merits, held on March 6 and 7, 1990. At the close of the evidence, this Court found that defendants Tony and Susan Alamo Foundation and Music Square Church, Inc. were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation. Accordingly, it is hereby:

ORDERED, ADJUDGED AND DECREED that the corporate forms of defendant Tony and Susan Alamo Foundation (t/d/b/a Southwest Business Management Company; Tony and Susan Alamo Christian Foundation; Holy Alamo Christian Church; Alamo Builders Emporium of Alma, Arkansas; Alamo Candy Company; Alamo Construction Company; Alamo Electric of Alma, Arkansas; Alamo Expert Roofing of Fort Smith, Arkansas; Alamo Land Development Company of Alma, Arkansas; Alamo Plumbing of Alma, Arkansas; Alamo Quarries of Alma, Arkansas; Alamo Packing of Alma Arkansas; Tennessee Country Boy Distributors and TCB Distributors), and defendant Music Square Church, Inc. (t/d/b/a Alamo Mini Mart; Holiness Tabernacle Christian School; Alamo of Nashville in Alma; Alamo Ready Mix; Alamo Discount Grocery; Hartford Advertising; Alamo Freight; Alamo Farms; Alamo Restaurant; Alamo Kerr-McGee Transmission Shop; Alamo DX and End Time Books), are hereby set aside and disregarded. Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony and Susan Alamo Foundation and Music Square Church, Inc. as well. It is

FURTHER ORDERED that defendants Tony and Susan Alamo Foundation and Music Square Church, Inc. are hereby dismissed from this case.

April 19, 1990

/s/ Morris S. Arnold
Hon. Morris S. Arnold
United States
District Judge

U.S. District Court
Western Dist. Arkansas

FILED
APR 19 1990

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER et al — PLAINTIFFS

V. — Civil No. 88-2206

TONY AND SUSAN ALAMO FOUNDATION et al — DEFENDANTS

ORDER AND JUDGMENT

NOW on this twenty-seventh day of April, 1990, comes on for consideration the above-styled cause.

IT APPEARING to the court that judgment should be entered for the plaintiffs for the reasons stated in the accompanying memorandum opinion, it is ORDERED that judgment be, and it is hereby, entered for the plaintiffs in the amounts specified:

(1)	Robert Miller	
	– Fair Labor Standards Act	$ 44,858
	– alienation of affection	50,000
	– outrage	100,00
	– punitive damages	50,000
		$244,858
(2)	Carey Miller	
	– Fair Labor Standards Act	$ 44,830
	– abuse of civil process	3,383
	– alienation of affection	50,000
	– outrage	150,000
	– punitive damages	75,000
		$323,213

(3)	Richard Miller	
	– Fair Labor Standards Act	$ 49,816
	– outrage	75,000
	– punitive damages	25,000
		$149,816
(4)	James Miller	
	– Fair Labor Standards Act	$ 44,450
	– outrage	25,000
	– punitive damages	10,000
		$ 79,450
(5)	Kody Miller	
	– Fair Labor Standards Act	$ 12,606
	– outrage, beating	50,000
	– punitive damages, beating	500,000
	– other outrage	25,000
	– other punitive damages	10,000
		$597,606
(6)	Justin Miller	
	– Fair Labor Standards Act	$ 12,606
	– outrage, beating	1,000
	– punitive damages, beating	5,000
	– other outrage	25,000
	– other punitive damages	10,000
		$ 53,606

/s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES
DISTRICT COURT

U.S. DISTRICT COURT
WESTERN DIST. ARKANSAS
FILED

APR 27 1990

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP,

on 4-27-90 by mss

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1826

Robert A. Miller; Kody Miller by Robert A. Miller; Robert Miller by Robert A. Miller; Carey Miller; Jeremiah Justin Miller by Carey Miller; Rick Miller; James Miller; Claudia Greiner; Ave Maria Askey; Nanette Miller; Appellees. v. Tony and Susan Alamo Foundation, Appellant, t/d/b/a Southwest Business Management Co., Tony and Susan Alamo Christian Foundation, Holy Alamo Christian Church, Alamo Builders Emporium of Alma, Ark., Alamo Candy Company, Alamo Construction Company, Alamo Electric of Alma, Ark., Alamo Expert Roofing of Fort Smith, Ark., Alamo Land Development Company of Alma, Ark., Alamo Plumbing of Alma, Ark., Tennessee Country Boy Distributors & TCB Distributors; Music Square Church, Appellant.	Appeal from the United States District Court for the Western District of Arkansas.

t/d/b/a Alamo Mini Mart, Holiness *
Tabernacle Christian School, Alamo *
of Nashville in Alma, Alamo Ready *
Mix, Alamo Discount Grocery, *
Hartford Adversing, Alamo Freight, *
Alamo Farms, Alamo Restaurant, *
Alamo Kerr-McGee Transmission *
Shop, Alamo DX, & End Times *
Books; Tony Alamo, a/k/a Tony *
Fernandoi, a/k/a/ Tony Fernando *
Alamo, a/k/a Bernie Lazar, a/k/a *
Bernie Hoffman, a/k/a Bernie Lazar *
Hoffman, a/k/a Boris Lazar, a/k/a *
Papa Tony, ind. & as officer & dir. *
of Tony & Susan Alamo Foundation *
& Music Square Church; Marc *
Lundgarten, ind. & managing agent *
for Tony & Susan Alamo *
Foundation & Music Square Church; *
Tommy Scarcello, ind. & managing *
agent for Tony & Susan Alamo *
Foundation & Music Square Church; *
Carol Ann Miller, a/k/a Carol Ann *
Landgarten, ind. & managing agent *
for Tony & Susan Alamo *
Foundation & Music Square Church; *
Susan L. Miller a/k/a Susan *
Scarcello, ind. & managing agent *
for Tony & Susan Alamo *
Foundation & Music Square Church. *
*

Submitted: December 10, 1990

Filed: January 23, 1991

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOODS,* District Judge.

WOODS, District Judge.

The plaintiffs, Robert A. Miller, et al, filed this suit in the Western District of Arkansas against Tony Alamo, three other individual associates, and two alleged corporate entities, the Tony and Susan Alamo Foundation (hereafter "Foundation") and Music Square Church, Inc. The first two counts of the complaint were based on the Fair Labor Standards Act, 29 U.S.C. § 206, et seq. and the Davis-Bacon Act, 40 U.S.C. § 276a, et seq. Count III of the complaint was based on the Arkansas minimum wage law, and the remaining counts alleged various common-law torts perpetrated against the plaintiffs. In an amended complaint the plaintiffs alleged diversity of citizenship. It was also alleged that the corporate entities were vehicles through which Tony Alamo perpetrated fraud (App. 8, 24), that the corporations were totally controlled by Tony Alamo and used for his personal benefit, and that this control and domination was so complete that the corporate entities had no independent personality or existence of their own (App. 12, 40).

The Foundation and Music Square Church, Inc. answered through joint counsel. None of the individual defendants answered although all were served in accordance with the applicable statute and Federal and State

---

* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

Rules of Civil Procedure. Since none of the individuals filed an answer, a default was entered against each of the individual defendants on August 17, 1989. No action has been taken regarding the default, and no appeal has been perfected therefrom. The issues with respect to the independent existence of the Foundation and Music Square Church, Inc., apart from Tony Alamo, were set for trial on March 5, 1990. After a two-day trial to the court, during which nine witnesses appeared for the plaintiffs and none for the defendants, as a result of the imposition of sanctions, the district court[1] made findings from the bench. They may be summarized as follows:

1. There was "abundant evidence" that the corporate defendants enjoyed no existence separate and apart from Tony Alamo.

2. There was no evidence that the Foundation was ever even incorporated, but even if it was, the Foundation was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo.

3. The corporations were shams, used by Tony Alamo for his own purposes.

4. Tony Alamo moved corporate assets into and out of the corporations, and between them, at will, and without regard to any ownership interest by the corporate entities.

5. Tony Alamo appointed and removed corporate officers at his personal whim.

---

[1] The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas.

> 6. Tony Alamo held out to the public that there was no distinction between himself and the corporations.
>
> 7. Corporate books and records were manufactured and destroyed, in a fraudulent manner, solely on the command of Tony Alamo.
>
> 8. Corporate officers and boards, and the corporate form in general, were ignored by Tony Alamo.
>
> 9. The corporate defendants were simply extensions, or "alter egos," of Tony Alamo.

The district court entered its order and judgment on April 19, 1990, providing *inter alia*:

> [D]efendants Tony and Susan Alamo Foundation and Music Square Church, Inc. were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation.
>
> . . . .
>
> . . . Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony and Susan Alamo Foundation and Music Square Church, Inc. as well.

(App. 191-192). The Foundation and Music Square Church, Inc. appealed from this judgment, raising four points: (1) the district court erred in disallowing the testimony of certain defense witnesses; (2) the district

judge should have recused; (3) the district court did not have personal jurisdiction over Tony Alamo; and (4) the court erred in finding that the Foundation and Music Square Church, Inc. were alter egos of the individual defendant Tony Alamo. We affirm.

I. REJECTION OF TESTIMONY FROM DEFENSE WITNESS

Appellants argue that the district judge abused his discretion in sustaining plaintiff-appellee's motion to exclude the testimony of all eight of the witnesses named in defendants' "Pre-Trial Information Sheet." The bases of appellee's motion were: (1) that the defendants should not be permitted to use witnesses who were first identified two business days before trial; and (2) that those witnesses who had been previously identified by name should be excluded because the defendants had failed to disclose their addresses, despite two prior orders of the court compelling them to do so.

In granting the motion, the court made the following findings:

> 1. The defendants had ignored orders of the Court requiring that they provide the addresses of prospective witnesses. (App. 217-18).
>
> 2. The defendants had willfully disobeyed the Court's orders for the purpose of causing delay and confusing the plaintiff's case preparation, and had "committed themselves to a course of obstruction." (App. 223-24).
>
> 3. By their conduct in disobeying the Court's orders and attempting to confuse the case, the

defendants had displayed contempt for the Court. (App. 224:1-2).

4. The defendants' transgressions had been repeated, and had consumed too much of the Court's time. (App. 224).

These findings are fully supported by the record, which is replete with instances of evasion, obstruction, and contumacy by the appellants. We find no abuse of discretion in granting appellee's motion.

II. RECUSAL OF THE DISTRICT JUDGE

Two days before the trial, appellants made a "Motion to Disqualify Presiding Judge" because "his prejudice in favor of the plaintiffs precludes the defendants from obtaining a fair and impartial trial." The only evidence presented in support of the motion consisted of two newspaper articles concerning a court proceeding. The motion was denied because it came too late and the two newspaper articles were inaccurate. There are two statutes dealing with judicial recusal – 28 U.S.C. § 455(b)(1) and 28 U.S.C. § 144. Section 455 has been interpreted to require a party to make its motion and facts known at the earliest possible time. *United States v. Kelly*, 519 F.Supp. 1029 (D. Mass. 1981); *Bradley v. Milliken*, 426 F.Supp. 929 (E.D. Mich. 1977); *In Re Bokum Resources Corp.*, 26 B.R. 615 (Bkrtcy., D.N.Mex. 1982). Clearly, the matter was known to the defendants when the newspaper articles, which constituted the entire basis for the defendants' motion, were published, which was in November, 1989. This delay was totally unexplained.

Section 144 requires that an affidavit be filed ten days before the beginning of the term. No affidavit was filed here. The newspaper articles, which were rank hearsay and demonstrably inaccurate, did not constitute a basis for recusal. The district judge properly denied the motion.

III. VALIDITY OF PERSONAL JUDGMENT AGAINST TONY ALAMO

Appellants argue that no personal judgment could be rendered against Tony Alamo. After the default was entered, the district judge took testimony on damages and entered a personal judgment against Tony Alamo in favor of the plaintiffs in the total amount of $1,448,549. *See Miller v. Tony and Susan Alamo Foundation*, 748 F.Supp. 695 (W.D. Ark. 1990). No appeal has been perfected from this judgment. Appellants' attorney does not represent Alamo.

It may be noted in passing that service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with Ark. R. Civ. P. Rule 4(f). The rule reads:

> Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of

> mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors.

The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. (App. 289-306). The summons and complaint were duly mailed. (App. 306-322). The warning order was issued by the Clerk and duly published. Service was properly perfected upon Alamo, according to the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure. Rule 4 (c) (2) (C) (i) Fed. R. Civ. P. permits service to be made "pursuant to the law of the state in which the district court is held."

Once service was properly made, personal jurisdiction was obtained against Alamo under the Uniform Long Arm Act, A.C.A § 16- 4101, *et seq.* (1987). This Act permits personal jurisdiction over one who has "committed a tortious act within the state." A.C.A. § 16-4-101(c)(1)(C) (1987). Here the principal portion of the damages assessed by the district judge resulted from a vicious beating administered by Alamo to two of the child plaintiffs in the presence of a large congregation of his cult followers. Another component of the damage award was the tort of alienation of affections. The Uniform Long Arm Act, after setting forth various methods of obtaining service, states: "This section does not repeal or modify any other law of this state permitting another procedure for service." A.C.A. § 16-4-102(E) (1987). *Horne v. Savers Federal Savings & Loan Association*, 295 Ark. 182, 747 S.W.2d 580 (1988) addressed precisely the issue now before us. In that case jurisdiction was also asserted

under the Uniform Long Arm Act, *supra*. Service was first attempted under Rule 4(e) of the Ark. R. Civ. P. which incorporates A.C.A. § 16-4-102-A(l) (1987). After making every attempt to serve the defendant, just as appellees did in the instant case, the plaintiff in *Horne* was relegated to the provisions of Rule 4(f). The service was upheld along with *in personam* jurisdiction:

> Appellants next challenge the chancellor's decision that appellee's service of process under ARCP Rule 4(f) was legally sufficient to give the Arkansas court in personam jurisdiction over them. Again, the appellants are wrong. . . .
>
> . . . .
>
> Under the circumstances demonstrated here, appellee was denied in its efforts to give appellants actual or personal service provided for out-of-state persons under the methods set forth under Ark. Code Ann. § 16-4-102(1) (1987) and ARCP Rule(e). As a consequence, appellee was relegated to obtain service of process on appellants under Rule 4 (f), which is another effective procedure for service under § 16-4-102, Arkansas's long-arm law. *See* Ark.Code Ann. § 16-4-102(E), (which provides this section does not repeal or modify any other law of this state permitting another procedure for service).

747 S.W.2d at 582-83.

This case is dispositive of appellants' argument that there was no *in personam* jurisdiction over Tony Alamo under A.C.A. §§ 16-4-101 and 102 and Rule 4(f). The Supreme Court of Arkansas specifically rejected the same arguments that appellant has made with regard to the applicability of A.C.A. § 16-58-119, holding that Rule 4(f)

applied and not this particular statute. As also provided in the Uniform Long Arm Act, domicile is a basis for personal jurisdiction. A.C.A. § 16-4-101(B). Such a jurisdictional basis is constitutional. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Undoubtedly Alamo was a domiciliary at the time the cause of action arose.

There is another basis for personal jurisdiction over Alamo. The Foundation and the Music Square Church have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities constituted an entry of appearance by Tony Alamo.

IV. SUFFICIENCY OF EVIDENCE TO ESTABLISH THAT ALAMO WAS AN ALTER EGO OF THE ALLEGED CORPORATIONS

Appellants argue that the evidence was insufficient to establish that the two alleged corporate entities were the alter egos of Tony Alamo. The district court's findings on the issue have been set out, *supra*. Appellants have utterly failed to sustain the burden that these findings were clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Their approach is to attack the credibility of the witnesses as "disgruntled former associates of the corporate defendants." At least two of the witnesses were not associates of Alamo. One was a reporter for the *Los Angeles Times*. At any rate, the credibility of these witnesses was a matter within the province of the district judge. We find that each of the court's findings was sustained by abundant evidence. The testimony of the witnesses stands unrebutted in the record.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER et al.

PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO FOUNDATION et al.

DEFENDANTS

MEMORANDUM OPINION

(Filed Apr. 27, 1990)

In this case, plaintiffs allege numerous causes of action against Tony Alamo and several corporate defendants, including the Tony and Susan Alamo Foundation and Music Square Church, a Tennessee corporation. They assert, first, that defendants violated the federal Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a)(1) and 207(a)(1), because plaintiffs performed work for defendants for which they were not paid. Plaintiffs also claim that defendant Tony Alamo purported to divorce Robert Miller and Carey Miller from their wives and purported thereafter to join their wives in matrimony with other men; they allege, too, that Mr. Alamo engaged in a concerted effort to estrange the Millers' minor children from them by asserting that their fathers were dead, were thieves and embezzlers, and were no longer their fathers. These allegations plaintiffs characterize as alienation of affection. Thirdly, plaintiffs seek to recover on the ground that defendants intentionally inflicted emotional distress on them by systematically subjecting them to "extreme,

outrageous practices." Some of these acts are the same as those plaintiffs previously characterized as alienation of affection. Finally, there is a claim captioned "wrongful use of civil proceedings" in which plaintiffs claim that Mr. Alamo initiated and continued an Ex Parte Application for Modification of Temporary Child Support Order for Change of Custody in California, and did so "without probable cause" or "primarily for a purpose other than . . . securing the proper adjudication of the claim . . . with a malicious motive." It is alleged in connection with this claim that plaintiffs in this action were successful in resisting that suit.

Mr. Alamo having wholly failed to answer or appear, the court caused a default judgment to be entered against him. At a subsequent hearing, the court concluded that the defendant corporations were entirely fictitious entities, having no separate existence from their leader Mr. Alamo, who created them, and treated them, as shells and shams for his own purposes, moving money from one to another and to himself at will, causing false records to be made, personally directing all of the business, and ignoring the boards of directors and the corporate form in general. For these reasons, and for others more specifically stated on the record at the hearing, the court declared that it would ignore the form of the corporate defendants and that any judgment recovered against Mr. Alamo was recoverable against the corporate defendants as well.

Plaintiffs having dismissed their claims against the corporate defendants, and the court having held a hearing on damages, the court will proceed to judgment against Mr. Alamo on each of plaintiffs' claims.

I.

It is familiar law that all well-pleaded allegations in a complaint are admitted by virtue of a defendant's default. In this case, plaintiffs have pleaded the facts necessary to establish a violation of the federal Fair Labor Standards Act and for the recovery of liquidated damages under that act. Since these amounts are sums certain, no proof is necessary to establish damages and the court will allow plaintiffs a recovery in the amounts indicated in the judgment.

II.

With respect to the other claims advanced by plaintiffs, the court is obliged to make a finding concerning damages since those claims are not for sums certain but, instead, for consequential damages. The court has had the advantage of a considerable amount of testimony from the plaintiffs on this issue and will now turn to a discussion of the evidence that bears on it.

The easiest of these damages to calculate are those attributable to plaintiffs' claim for abuse of civil process: Carey Miller testified that he spent $3,383.00 for attorney's fees to fend off this frivolous suit and the court finds no difficulty whatever in awarding these to him.

The court now turns to the most disturbing of the allegations of plaintiffs' complaint. Plaintiffs assert that Tony Alamo put on "public exhibitions of corporal punishment, in the form of paddling upon minor children"; and the proof amply showed that Kody Miller, while

being restrained by four adult men, was struck vigorously 140 times with a large wooden paddle by a grown man. The evidence further showed that this punishment was inflicted in a room filled with adults and children and was not only painful (Kody's buttocks were bleeding) but humiliating in the extreme. One of the adult witnesses, indeed one of the principal participants, was Kody's mother.

One difficulty in the way of recovering for this atrocious act is that plaintiffs have not directly asked for relief on account of an assault and battery, evidently preferring, instead, though this is far from clear from the complaint, to lay this claim as an intentional infliction of emotional distress. (Count V incorporates the paddling assertion by reference and alleges that "all plaintiffs" were subjected "to humiliation and public ridicule"; this count also asserts that "the plaintiffs have "suffered physical . . . injury.") Of course, plaintiffs can recover only for acts which it can fairly be said defendants have admitted by defaulting. Though it is a close question, the court holds that defendants have admitted the public paddling of Kody Miller. It is true, too, that reasonable physical correction is not tortious, *see, e.g., Wise v. Pea Ridge School District*, 855 F.2d 560, 564 (8th Cir. 1988), and *Berry v. Arnold School District*, 199 Ark. 1118, 1124-25 (1940), *see also Ingraham v. Wright*, 430 U.S. 651, 663 (1977), and *Dodd v. State*, 94 Ark. 297, 300-01 (1910), but in the court's view, public corporal punishment of children is a *prima facie* tort which, if it can be justified at all, needs to be defended by way of answer and proof. The court can, moreover, imagine no offense that could justify the

amount of physical force used against Kody Miller in this instance.

The court can conceive of no higher duty incumbent on it than the protection of children from outrageous batteries like the one that the evidence here so plainly reveals. No feeling person could fail to be moved by the testimony in this case or to be revolted by the cold-blooded and calculated manner in which the punishment of Kody Miller was carried out. The court awards him $50,000.00 in compensatory damages for his pain, suffering, and humiliation. Nor, in the court's mind, would it be right to allow defendant to go unpunished for this act. It is true that criminal proceedings have been initiated based on the facts presented here; and it is equally true that punitive damages, though an obviously sufficient case has been shown for their imposition, may nontheless be withheld at the discretion of the factfinder. The court is also aware that punitive damages have been severely criticized because of their capacity for arbitrariness and their unpredictability. But in this case the court has no hesitation in finding that an award of such damages is appropriate. For one thing, Mr. Alamo is a fugitive: He has numerous warrants out for his arrest and the prospects for his apprehension are not clear. It is thus not obvious that he will ever be compelled to account for his offenses in a criminal court. For another thing, it can hardly be maintained that the acts perpetrated here are not ones that a reasonable person would not know would earn him the severest kind of censure.

One other difficulty needs to be faced up to. Under current law, a defendant's net worth is a relevant datum

in determining an appropriate amount of punitive damages. This manner of looking at things can be and has been intelligently criticized, but there is no question that it is the prevailing law. In this case, the court has had not a little difficulty in determining the net worth of the defendant, but mainly because of his recalcitrance and utter unwillingness to recognize the authority of this court or, indeed, of any other. There was testimony that he boasted of being extraordinarily wealthy, with a net worth in the tens of millions. This may well have been bluster, but it is abundantly plain that not long ago he enjoyed a cash flow of thousands of dollars a day. When the defendant is a wilful fugitive, when it has been shown that he flagrantly defies the law by the fabrication and forgery of financial records, and when the answers to the relevant questions are peculiarly within his knowledge, the court is justified in presuming the worst against him. The court therefore awards punitive damages to Kody Miller in the amount of $500,000.00.

Kody Miller also asks to recover for past and future psychiatric and counseling expenses. The court sees a difficulty in the way of awarding these damages that seems to it unsurmountable. There might be no difficulty in concluding that Kody could benefit from psychiatric help on account of what manifestly must have been a harrowing experience. But one of his very able counsellors testified that Kody's experience at the Alamo Foundation had made it very difficult for him to adjust to a new life in California. For instance, she said, he had embarrassed himself and earned the scorn of his schoolmates because he had openly criticized Martin Luther King in class. What this suggests to the court is that the

damages sought here are for what might be called deprogramming. The court does not think that it would be proper to award money to Kody on account of any discomfiture experienced by him on account of ideological nonconformity. Courts cannot compel parents and churches to contribute to the inculcation of religious or political beliefs with which they do not sympathize. Religious and political beliefs, no matter how bizarre and nonconforming, are personal matters and the courts are not instruments of orthodoxy charged with the responsibility of keeping citizens on the ideological straight and narrow. The court therefore declines to award damages of this character.

III.

Plaintiffs here, as already noted, also asserted that defendants have committed acts that amount to an alienation of affection. Specifically, they have averred that Mr. Alamo purported to divorce Robert Miller and Carey Miller from their wives by means of a so-called get, a biblical bill of divorcement, and later purported to marry these women to other men. Plaintiffs Robert and Carey Miller also claim that Mr. Alamo alienated their children from them by telling the children that their fathers were dead, that they were thieves and embezzlers, and that they were no longer legally their fathers; Mr. Alamo also, according to plaintiffs, hid the children so that plaintiffs could not find them.

The second of these asserted claims can be shortly dealt with: Arkansas does not recognize as tortious the alienation of one's children's affection. *See Orlando v.*

Alamo, 646 F.2d 1288, 1289-90 (8th Cir. 1981). Though Mr. Alamo has admitted the acts complained of by his default, the court still has a duty to determine whether those acts are actionable. As they are not, the court dismisses this claim. As for the claim of alienation of the wives' affection, the Arkansas legislature, by virtue of Act 46 of the 1989 session, specifically provided that the "actions of alienation of affection and criminal conversation are abolished," but a savings clause provides that the act does not apply to "litigation pending before the effective date of this act." The effective date of the act was November 14, 1989; this action was filed more than a year previous. Therefore the act is of no effect on this litigation.

An issue that arises in the special context of this case, however, must still be addressed, and that is whether Mr. Alamo's actions are not protected by the First Amendment guarantee of freedom of religion. The question is not whether he may constitutionally be denied the actual power to divorce a man from his wife; the court entertains no doubt that he may. The question is rather a more subtle one, namely, whether Mr. Alamo may constitutionally be deprived of the right to persuade a woman, for religious reasons, to leave her husband and take up with another man. This question might have been attended by the largest difficulties, but the court sees no necessity of addressing it directly because the complaint alleges that Alamo committed these acts "to further his scheme . . . and to cause further injury to the plaintiffs." Fairly construed, these allegations excluded a genuine

religious purpose from the list of possible motives entertained by Mr. Alamo and the court therefore holds these facts actionable.

The matter of damages presents a real difficulty. Though plaintiffs testified that they had previously had good marriages, it is not very easy to put a number on a tort of this sort. The Supreme Court of Arkansas has frequently been urged to set aside verdicts in cases of this sort because they were excessive, but it has never done so. *See, e.g., HVASTA v. McGough,* 276 Ark. 168, 633 S.W.2d 31 (1982); *Hammond v. Peden,* 224 Ark. 1053, 278 S.W.2d 96 (1955); *Alexander v. Johnson,* 182 Ark. 270, 31 S.W.2d 304 (1930); *Weber v. Weber,* 113 Ark. 471, 169 S.W. 318 (1914). In *Hardy v. Raines,* 228 Ark. 648, 310 S.W.2d 494 (1958), the court sustained an award of $65,000.00. The court will award plaintiffs Robert and Carey Miller $50,000.00 each on this claim but declines to award punitive damages.

Another of plaintiffs' claims can be briefly dealt with. Young Justin Miller was also publicly punished but his paddling was not as severe as Kody's: He received ten swats. The court nevertheless believes that the public nature of this punishment makes it actionable and will award Justin Miller $1,000.00 in actual damages and $5,000.00 in punitive damages. There was testimony at the trial that at least part of the motive for Justin's paddling was to deter him from telling the authorities about the beatings being administered at Mr. Alamo's direction. The children had been admonished to refer to the punishments meted out as "spankings." Had these facts been pleaded the court would have awarded punitive damages in a much larger amount, for in that event the motive

would have been admitted by the defendants. But on the present record it feels unable to make a larger award.

IV.

Finally, plaintiffs allege numerous other acts which they characterize in Count V of their complaint as the intentional infliction of emotional injury. Among these acts were causing business documents to be executed under physical duress, publishing defamatory statements, slandering plaintiffs to their spouses, filing false criminal charges, breaking and entering plaintiffs' houses, hiding their children and spouses, and subjecting plaintiffs to humiliation and public ridicule. Included in these allegations also was the assertion that Mr. Alamo subjected the plaintiffs to a regimen including no time for sleep coupled "with an extremely poor diet and bizarre fasts" which left plaintiffs "confused, demoralized and unable to clearly think or reason," all this with a design to undermine and eventually to destroy "plaintiffs' self-respect, self-esteem and that concept of self and self-worth known by mental health professionals as 'ego.' " This harrowing list of abuses the defendant has chosen to admit by his default.

There can be no doubt that these acts are all actionable. The court again must face the difficulty of finding a number to compensate for this monstrous scheme of premeditated psychological injury. Because Carey Miller was subjected to the worst of these abuses, his recovery should be the highest. The court has consulted its trial

notes to determine appropriate damages for each individual defendant, and awards them in the amounts indicated in the judgment.

V.

A judgment consistent with this opinion will issue.

April 27, 1990
Date

/s/ M. S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES
DISTRICT JUDGE

JOHN D. LEWIS, P.C.
LAW OFFICES
2405 EAST SOUTHERN, SUITE 3
TEMPE, ARIZONA 85282
(602) 820-9600
STATE BAR 001172

Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

ROBERT A. MILLER, CAREY MILLER, RICHARD MILLER, JAMES MILLER, KODY MILLER and JUSTIN MILLER, Plaintiffs, vs. TONY ALAMO a/k/a BERNIE L. HOFFMAN, BERNIE LAZAR; BERNIE LaZAR; BERNIE LAZAR HOFFMAN; PAPA TONY; BERNIE HOFFMAN; ANTHONY ALAMO, JR.; BERNIE LaZAR HOFFMAN; TONY FERNANDO; TONY FERNANDO ALAMO; t/d/b/a/ MUSIC SQUARE CHURCH, INC; MUSIC SQUARE CHURCH; ALAMO MINI MART; HOLINESS TABERNACLE CHRISTIAN SCHOOL; ALAMO OF NASHVILLE IN ALMA; ALAMO READY MIX; ALAMO DESIGNS, INC.; ALAMO DESIGNS, INC.; ALAMO DESIGNS; ARTISTRY IN GLITZ; ALAMO DISCOUNT	No. CV 90-15200 DEFAULT JUDGMENT (Filed Nov. 14, 1990)

GROCERY; HARTFORD ADVERTISING; END TIME BOOKS; ALAMO RESTAURANT; ALAMO DX; and ALAMO-KERR-McGEE TRANSMISSION SHOP; TONY AND SUSAN ALAMO FOUNDATION; TONY AND SUSAN ALAMO CHRISTIAN FOUNDATION; HOLY ALAMO CHRISTIAN CHURCH; HOLINESS TABERNACLE CHURCH; SOUTHWEST BUSINESS MANAGEMENT COMPANY; ALAMO BUILDERS EMPORIUM OF ALMA, ARK.; ALAMO CANDY COMPANY; ALAMO CONSTRUCTION COMPANY; ALAMO ELECTRIC OF ALMA, ARK.; ALAMO EXPERT ROOFING OF FORT SMITH, ARK.; ALAMO LAND DEVELOPMENT COMPANY OF ALMA, ARK.; ALAMO PLUMBING OF ALMA, ARK.; ALAMO QUARRIES OF ALMA, ARK.; ALAMO PACKING OF ALMA, ARK.; TENNESSEE COUNTRY BOY DISTRIBUTORS; and TCB DISTRIBUTORS;

MUSIC SQUARE CHURCH, INC.,

THE TONY AND SUSAN ALAMO FOUNDATION, INC.

TWENTIETH CENTURY HOLINESS TABERNACLE CHURCH, INC.

JOHN DOES I THRU V

JANE DOES I THRU V

Defendants.

THIS MATTER, coming on to be heard by the Court the date last set forth herein; the plaintiffs appearing by and through their attorney, John D. Lewis, and the following defendants having been served by personal service out of state, to-wit: The Tony and Susan Alamo Foundation, Inc. and Music Square Church, Inc., and the following defendant having been served out of state by Registered Mail, Twentieth Century Holiness Tabernacle Church, Inc., and the remaining defendants having been served by publication, and the defendants having failed to answer or defend; the default of the defendants having been duly entered according to law;

The Court finding that the allegations of plaintiffs' Complaint are true,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs have Judgment against the defendants, and each of them, as follows:

1. That the Deed attached to the Complaint as Exhibit F and attached hereto as Exhibit A wherein Music Square Church, Inc. is the grantor, and Twentieth Century Holiness Tabernacle Church is the grantee is a fraudulent conveyance and is null and void and of no force and effect.

2. That the Judgment of the United States District Court attached hereto as Exhibit B dated April 27, 1990, is hereby declared a lien upon the real property described as follows, superior to any interest of the defendants in said property:

> Lot 11, ZELLA VISTA, a subdivision recorded in the office of the Maricopa County Recorder in Book 30 of Maps, Page 40.

3. The defendants are hereby enjoined from transferring, encumbering or in any manner disposing of the real property described herein.

4. That the conveyance and transfers to Twentieth Century Holiness Tabernacle Church, Inc. from other defendants, as well as any other conveyances for less than fair consideration, or in fraud of creditors, are hereby decreed to be null and void as to the plaintiffs.

5. That the property described herein may be sold as provided by law to satisfy this Judgment which incorporates the Judgment set forth herein as Exhibit B and all costs and attorney's fees awarded by the Court, and that the proceeds of such sale be applied to the cost of these proceedings, the proceedings in Federal Court represented by the Judgment in Exhibit B, and any other Judgment of the plaintiffs.

6. A Writ issue on the filing of this Complaint attaching the assets of each defendant.

7. That John D. Lewis, Esq. is hereby appointed Receiver to hold and manage the property of the defendants, including the property described herein.

8. That the corporate form Twentieth Century Holiness Tabernacle Church, Inc. and Tony Alamo and the other defendants set forth herein are declared to be one and the same, and all of said defendants are merely aliases and the alter-ego of said Tony Alamo, and any Judgments which lie against the said Tony Alamo lie against said defendants.

9. That the plaintiffs are awarded their costs incurred and accruing costs.

DONE IN OPEN COURT this 14th day of November, 1990.

/s/ Robert P. Murphy
COURT COMMISSIONER
ROBERT P. MURPHY

IN THE CHANCERY COURT OF
CRAWFORD COUNTY, ARKANSAS

ROBERT A. MILLER, ET. AL — PLAINTIFFS

VS. — NO: E-90-284 (I)

TONY AND SUSAN ALAMO
FOUNDATION, ET. AL. — DEFENDANTS

ORDER AND JUDGMENT

(Filed Mar. 6, 1991)

This matter came before the court upon a motion by the plaintiffs to strike the answers of two of the defendants, the Tony and Susan Alamo Foundation (a California corporation) and Music Square Church, Inc. (a corporation organized under the laws of the State of Tennessee) and the Plaintiffs Motion for Entry of Judgment. The Court has considered the plaintiffs' motion and the material presented in support thereof, and finds as follows:

1. The plaintiffs filed this action on May 11, 1990, naming four defendants. These defendants are enumerated in the Complaint, and are also identified by various aliases and fictitious names. The named defendants are Tony Alamo, individually, the Tony and Susan Alamo Foundation (hereinafter referred to as "Foundation"), Music Square Church, Inc. (hereinafter referred to as "Music Square"), and Twentieth Century Holiness Tabernacle Church, Inc., a corporation organized under the laws of the State of Arkansas (hereinafter referred to as "Twentieth Century").

2. The gravemen of the plaintiffs' Complaint is that certain real property located in Crawford County, Arkansas was fraudulently conveyed by Tony Alamo to the Foundation, and then to Music Square, and finally to Twentieth Century. The plaintiffs allege that each of the corporate entities was merely an "alter-ego" of Tony Alamo, and that there should be no legal distinction between any of the corporations and Mr. Alamo.

3. The plaintiffs in this action had previously brought suit against Tony Alamo, the Foundation and Music Square in the United States District Court for the Western District of Arkansas. *See: Robert A. Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, C.A. No. 88-2206 (W.D.Ark). After a two-day trial in March, 1990, the U.S. District Court for the Western District of Arkansas found that the Foundation and Music Square were, in fact, vehicles through which Tony Alamo perpetrated fraud, and that they were nothing more than the "alter-egos" of Mr. Alamo. The District Court then entered a declaratory judgment, setting aside the corporate forms of these two corporations, and declaring that any judgment which the plaintiffs might obtain against Mr. Alamo would lie against these corporate forms as well.

4. The plaintiffs subsequently obtained a money judgment in their favor, and against Tony Alamo, in the amount of $1,448,549.00, plus interest, costs and attorneys' fees. *See*: *Miller v. Alamo, supra* (judgment entered April 27, 1990, modified September 6, 1990).

5. The instant action has arisen as a result of the plaintiffs' efforts to enforce the April 27, 1990 judgment against Tony Alamo by levy upon real property located in

Crawford County, Arkansas, and allegedly owned by Tony Alamo. Although the subject property is currently titled to Twentieth Century, the plaintiffs have alleged that the property was previously transferred from Tony Alamo to the Foundation, then from the Foundation to Music Square, and finally, from Music Square to Twentieth Century, all as part of an ongoing effort by Tony Alamo to defraud creditors and hinder and delay their efforts to collect various amounts owed by Mr. Alamo. The plaintiffs specifically alleged that the transfer from Music Square to Twentieth century occurred during the pendency of the litigation in *Miller v. Alamo, supra,* for the specific purpose of preventing the plaintiffs from collecting any judgment they might obtain in that case.

6. As part of the relief the plaintiffs have requested in the instant case, the plaintiffs have asked that this Court declare Twentieth Century to be nothing more than another of the sham corporations erected by Mr. Alamo for the purpose of defrauding creditors, and that Twentieth Century is still one more "alter-ego" of Mr. Alamo.

7. Service of process in this case was effected with respect to Tony Alamo constructively, pursuant to Rule 4(f) of the Arkansas Rules of Civil Procedure. Mr. Alamo has failed to appear or defend this action. Consequently, on October 2, 1990, this Court entered an Order of Default Judgment against Tony Alamo.

8. The plaintiffs served process in this case upon Twentieth Century by actual service. Twentieth Century also failed to appear or otherwise defend this action. Consequently, on August 31, 1990, this Court entered an Order of Default Judgment against Twentieth Century.

9. The Foundation and Music Square however, appeared by counsel, and filed an answer on or about June 11, 1990. The plaintiffs, however, maintain that neither the Foundation nor Music Square has the capacity to appear and answer in its own right, since they have previously been declared to be sham corporations which are not entitled to recognition as legal "persons." In addition, the plaintiffs maintain that neither the Foundation nor music Square would have standing to contest the instant action, since the only relief the plaintiffs are seeking is the re-conveyance of property from Twentieth Century (an entity in default) back to Tony Alamo. As such, neither corporate entity would suffer any injury in fact, regardless of the outcome of this case.

Discussion

On the record now before the Court, it is plain that both Music Square Church, Inc. and the Tony and Susan Alamo Foundation lack the capacity to appear as parties to this action. Each of them has been stripped of its legal capacity to act as an independent person as a consequence of the declaration of the U.S. District Court for the Western District of Arkansas, as set forth in its April 19, 1990 judgment in *Miller v. Alamo*. That was a contested proceeding, in which each of these two corporations appeared, by counsel, and had a full and fair opportunity to litigate the question of their entitlement to recognition as legal entities separate and apart from Tony Alamo. That decision having been decided adversely to them, the issue of their legal existence is *res judicata*.

In addition, even if Music Square Church, Inc. and the Tony and Susan Alamo Foundation were legal cognizable entities, they are not the real parties in interest in this case. The sole relief the plaintiffs are seeking is to have the real property in question conveyed back from the Twentieth Century Holiness Tabernacle Church, Inc. to Tony Alamo or his already judicially declared alter-egos. Neither of the corporate defendants who have filed answers in this case stand to suffer any injury whatsoever should the plaintiff's motion be granted, since they do not claim any right to, or interest in, the real estate in question.

Rather than protecting their own, legitimate interests, it is apparent to the Court that these two corporate entitles, previously having been found to be nothing more than the tools and an extension of Tony Alamo, have appeared in this case as surrogates for Mr. Alamo. It is the law of this state that litigation must be carried only in the name of the "real party in interest." Ark.R.Civ.P. 17. Moreover, for sound reasons of public policy, fugitives from justice, including Mr. Alamo, are prohibited from availing themselves of the processes of the courts of this and any state. *See: Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498 (1970). It would violate that policy to permit Mr. Alamo to remain a fugitive from justice and still appear in this case and defend through surrogate entities.

For all of these reasons, the Court finds that the plaintiffs' Motion to Strike the Answers of Music Square Church, Inc. and the Tony and Susan Alamo Foundation is well taken, and will be granted.

Since the only other parties to this action, Tony Alamo and Twentieth Century, have defaulted, it appears the plaintiffs are now entitled to judgment. Twentieth Century, the current title holder, has admitted the allegations of the plaintiffs' Complaint to be true by virtue of its default. These admissions establish as fact both that the conveyance by form of "Corporate Deed" from Music Square Church, Inc. to Twentieth Century Holiness Tabernacle Church, Inc. on July 25, 1989 (filed in the Clerk's Office on July 26, 1990) which described fifteen properties was a fraudulent conveyance and that Twentieth Century is nothing more than an "alter-ego" of Tony Alamo. These facts being established, it remains to determine what relief can be granted the plaintiffs.

Plaintiffs have met and established by virtue of the facts plead and the prior judicial determinations all of the elements of the Arkansas Fraudulent Transfer Act of 1987. Ark. Stat. Ann. Sec. 4-59-201 *et. sec.*. Pursuant to the Act, the Court finds that Alamo, the Foundation and Music Square violated the act by virtue of intending to fraudulently transfer their property to Twentieth Century in order to hinder, delay or defraud the Plaintiffs.

Further pursuant to the Act Section 204, defendants Alamo, Foundation and Music Square have not received a reasonably equivalent value in exchange for the property.

The Act also provides for a variety of remedies which are available to the Court for violation of its provisions. Section 207(a). These include: (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim; (2) an attachment or other provisional remedy against the asset transferred or other property of

the transferee; (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure, enjoin further disposition by the debtors or transferee, or both, of the asset transferred or other property, appoint a receiver to take charge of the asset transferred or any other property of the transferee, and/or any other relief the circumstances may require.

Further pursuant to the Act, where as here, a creditor has obtained a judgment on a claim against the debtor, the court may levy execution on the asset transferred or its proceeds. Ark. Stat. Rev. Section 4-59-207(b).

Arkansas Rule of Civil Procedure Rule 70 grants this Court the authority to enter an Executory Order to act directly to secure the necessary result which this Court must require. *McDermott v. McAdams*, 272 Ark. 20, 616 S.W.2d 476 (1981).

Also where, as here, a corporation organized under the laws of this state is functioning as a vehicle through which to perpetrate fraud, and operating as the "alter-ego" of an individual, this Court has the power to set aside that corporate form. It appearing to the Court that Twentieth Century Holiness Tabernacle Church, Inc. is such a sham corporation, and that it is functioning as the "alter-ego" of Mr. Tony Alamo, he Court will declare the corporate form of Twentieth Century Holiness Tabernacle Church, Inc. to be invalid and set it aside.

The Court also has the ability under the Act to take action to ensure that its orders are enforced. This is especially necessary were, as here, Tony Alamo and his various aliases and entities have shown flagrant disregard for the process of law and of this and other Courts.

This is especially true where, as here, Mr. Tony Alamo is a fugitive from Justice and there are not parties capable of making the requisite property transfers which the Court deems appropriate.

In order to ensure that Plaintiffs are actually granted that to which they are entitled from Mr. Alamo and his entities, the Court deems it appropriate to take protective action. Accordingly, the Court will declare the conveyances described in the Complaint to be fraudulent, will set those conveyances aside, and vest title in the pre-conveyance owner, Music Square. Further, the Court will direct the Clerk of the Court to enter this Order into the property records of Crawford County, Arkansas, to serve as notice to the world that this action has been taken. The Court also will enjoin Mr. Alamo, his entities and aliases from transferring or otherwise disposing of any real or personal property or assets until all sums to which Plaintiffs are entitled have been satisfied.

Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

1. The answers of Music Square Church, Inc. and the Tony and Susan Alamo Foundation filed in this action re hereby stricken, and they are dismissed as parties to this litigation.

2. The corporate form of Twentieth Century Holiness Tabernacle Church, Inc., organized as a corporation under the laws of the State of Arkansas, is hereby set aside, and all assets and liabilities of that entity are declared to be those of Mr. Tony Alamo individually.

3. The "Corporate Deed" dated July 25, 1989, recorded in the Office of the Crawford County Circuit and Chancery Clerk at Record Book 89-16, Page 206, is declared to be fraudulent, null and void.

4. The judgment of the plaintiffs in this action, obtained by them in *Robert A. Miller, et al. v. The Tony and Susan Alamo Foundation, et al.*, Civil Action No. 88-2206 on April 27, 1990 as amended, is declared to be a lien upon the property described in the aforementioned deed dated July 25, 1989, recorded in the Office of the Crawford County Circuit and Chancery Clerk at Record Book 89-16, Page 206, as well as a lien upon all other property located in Crawford County, Arkansas, real and personal, which belongs to or is titled in the name of Tony Alamo, the Tony and Susan Alamo Foundation, Music Square Church, Inc. and/or Twentieth Century Holiness Tabernacle Church, Inc.

5. Tony Alamo, and all those purporting to act as an agent or employee of Tony Alamo, the Tony and Susan Alamo Foundation, Music Square Church, Inc. and/or Twentieth Century Holiness Tabernacle Church, Inc., are hereby enjoined from transferring or conveying any real or personal property located in Crawford County Arkansas to any third party, until such time as the judgment of the plaintiffs in *Robert A. Miller, et al. v. the Tony and Susan Alamo Foundation, et al.*, Civil Action No. 88-2206 (including any interest, costs or attorney's fees due in connection with that judgment) is fully satisfied.

6. The Chancery Clerk is hereby directed to enter this Order and Judgment within the Record Books of

Crawford County, Arkansas, in such a manner as to give notice of the contents of this Order to all who look there.

7. The Clerk of this Court shall cause a certified copy of this Order and Judgment to be sent to the Office of the Secretary of State of Arkansas so that it may be noted upon the Articles of Incorporation, Charter and any other appropriate official records of Twentieth Century Holiness Tabernacle Church, Inc., so that any appropriate action be taken by the Secretary of State.

8. This Court retains jurisdiction over this matter for the purpose of entertaining petitions by the plaintiffs for such additional orders or relief as may be necessary to effectuate the provisions of this judgment.

Dated: 4 February 1991

/s/ Warren O. Kimbrough
Chancery Judge